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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF JANUARY 8, TO AND
INCLUDING DECISIONS OF FEBRUARY 26, 1907,

WITH

NOTES, REFERENCES AND INDEX.

By EDWIN A. BEDELL,
STATE REPORTER.

VOLUME 187.

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EDWARD T. BARTLETT,

ALBERT HAIGHT,

IRVING G. VANN,

WILLIAM E. WERNER,

ASSOCIATE JUDGES.

WILLARD BARTLETT,

FRANK H. HISCOCK,

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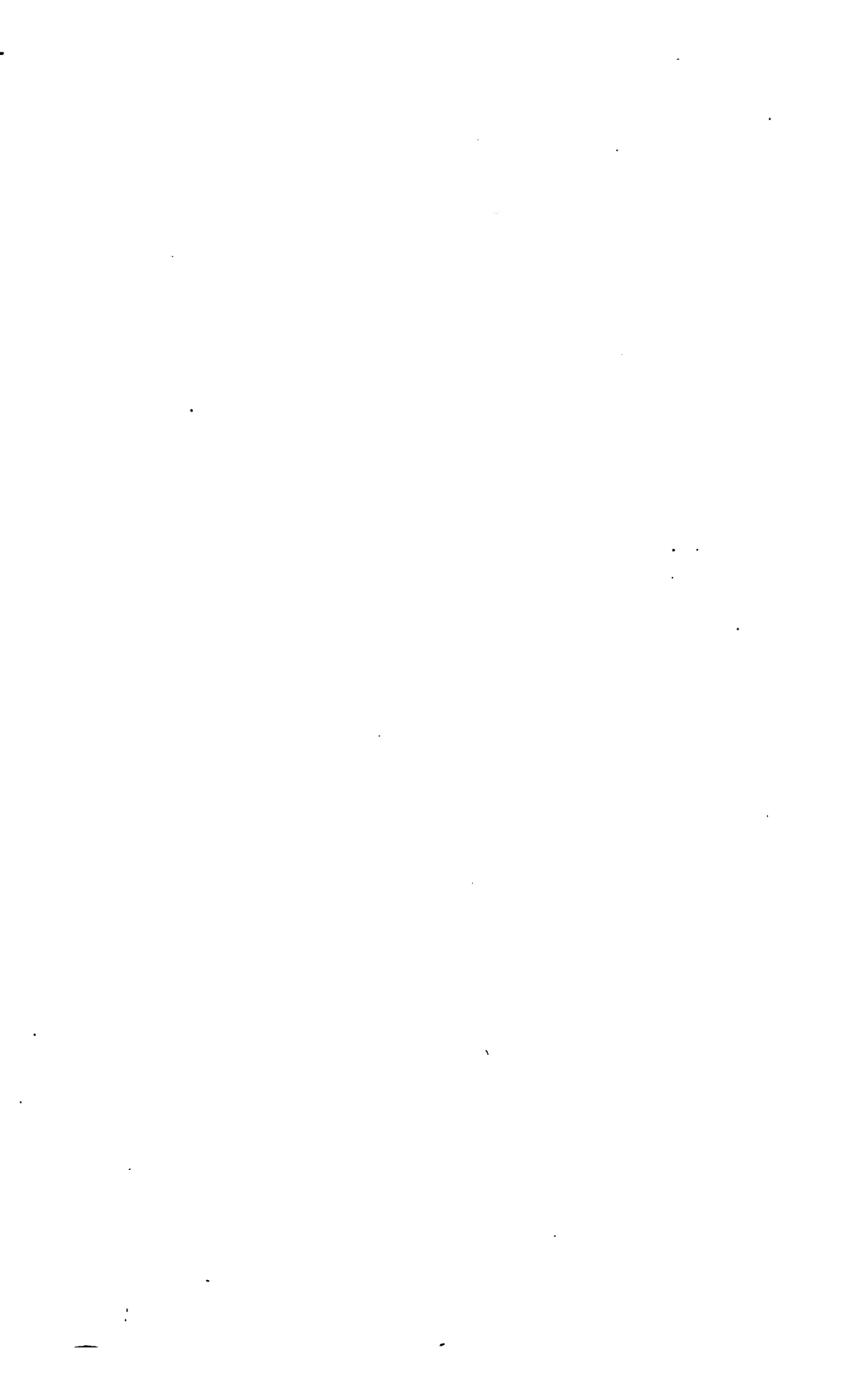


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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING JANUARY 7, 1907.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY A.
LA CHICOTTE, Appellant, v. GEORGE E. BEST, as Commis-
sioner of Bridges of the City of New York, Respondent.

1. **MANDAMUS — PROCEEDING AGAINST AN OFFICER OF A MUNICIPALITY FOR ENFORCEMENT OF A RIGHT, NOT ABATED BY RESIGNATION OR REMOVAL OF OFFICER.** A proceeding against an officer of a municipality for the enforcement of a right of a relator against the municipality does not abate by the resignation, removal or expiration of term of the officer, but may be enforced against his successor or successors.

2. **SAME.** Where an assistant engineer in the department of bridges in the city of New York, appointed after passing the civil service examinations, who was suspended without pay by the commissioner of bridges, upon the ground that his services were no longer necessary, under section 1543 of the charter of the city of New York (L. 1901, ch. 466), procured an alternative writ of mandamus to compel his reinstatement, which, after a trial of the issues involved, was decided in his favor, and then moved the court for a final order granting a peremptory writ, the hearing of which motion was postponed from time to time for a period of about two months, when the case was orally argued and time given for counsel to submit written briefs, during which time the commissioner of bridges resigned, and thereupon, and before any decision of the motion for a peremptory writ was made, the corporation counsel of the city, upon affidavits showing the resignation of the defendant, moved for an order declaring the proceeding abated, it is reversible error for the Special Term to quash, supersede and set aside the writ upon the ground that the pro-

ceeding had abated. The successor of such commissioner should have been substituted and the proceeding continued against him as the defendant therein.

People ex rel. La Chicotte v. Best, 112 App. Div. 912, reversed.

(Argued November 12, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1906, which affirmed an order of Special Term quashing an alternative writ of mandamus upon questions of law only and not by reason of the exercise of any discretion vested in the court.

The facts, so far as material, are stated in the opinion.

J. Quintus Cohen and *Francis G. Caffey* for appellant. Where a mandamus proceeding is instituted against a municipal public officer solely in his official capacity no abatement results from a change in the incumbency of the office during the pendency of the proceeding, and a peremptory writ granted without a change of parties is enforceable against the successor in office of the original defendant. (*People ex rel. Shaut v. Champion*, 16 Johns. 61; *People ex rel. Case v. Collins*, 19 Wend. 56; *People ex rel. Scott v. Supervisors*, 8 N. Y. 317; *People ex rel. Dannat v. Comptroller*, 77 N. Y. 45; *People ex rel. Wooster v. Maher*, 64 Hun, 408; *People ex rel. Cunliffe v. Cram*, 30 Misc. Rep. 561; *People ex rel. Melledy v. Shea*, 73 App. Div. 232; *People ex rel. Lazarus v. Coleman*, 99 App. Div. 88; *Parks v. Hayes*, 11 Colo. 415, 429; *State's Attorney v. Selectmen*, 59 Conn. 402, 409.) The proceeding is not against respondent Best personally, but is against him solely in his official capacity as commissioner of bridges seeking to compel performance of an official duty. (*People ex rel. McDonald v. Clausen*, 163 N. Y. 523; *People ex rel. Hart v. La Grange*, 7 App. Div. 311; *People ex rel. Gildersleeve v. Dalton*, 44 App. Div. 556; *Jones v. Wilcox*, 80 App. Div. 167; *People ex rel. Baird v. Nixon*, 158 N. Y. 221; *Supervisors v. Birdsall*, 4 Wend. 453; *People ex rel. Heiser v. Gilon*, 121 N. Y. 551; *People ex rel.*

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Brockport v. Sutphin, 166 N. Y. 163; *Cummings v. Van Schoyck*, 43 N. Y. 514; *Berry v. Schaud*, 50 App. Div. 134.)

John J. Delany, Corporation Counsel (*Theodore Connolly* and *William B. Crowell* of counsel), for respondent. A mandamus proceeding abates by the death, resignation or termination of office of the defendant where the proceeding is a personal one. (*Secretary v. McGarrahan*, 9 Wall. 298; *United States v. Boutwell*, 17 Wall. 604; *United States v. Chandler*, 122 U. S. 643; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28; *United States v. Butterworth*, 169 U. S. 600; *Comrs. v. Sellen*, 99 U. S. 624; *Thompson v. U. S.*, 103 U. S. 480; *Murphy v. Utter*, 186 U. S. 95; *W. V. S. Co. v. Smith*, 165 U. S. 28; *People ex rel. Taylor v. Welde*, 61 App. Div. 580.)

HAIGHT, J. The relator, after passing the civil service examination, had been appointed as principal assistant engineer in the department of bridges in the city of New York, and as such received an annual salary of six thousand dollars. The defendant Best was the commissioner of bridges, and on the second day of December, 1904, he, in writing, notified the relator that his services had been found to be unnecessary and he was, therefore, notified that under the provisions of the Greater New York charter, as amended (§ 1543), he was suspended without pay, such suspension to take effect December 31, 1904, and that his name had been sent to the municipal civil service commission to be placed on the preferred eligible list for reinstatement in the city service. After the relator's suspension had become effective he demanded of the commissioner of bridges that he be reinstated, and, upon the commissioner's refusal, he procured an alternative writ of mandamus to compel such reinstatement. An issue of fact was formed, which was brought to trial before a jury in the following October and resulted in a verdict in his favor. Thereupon the relator caused a notice of motion to be served asking for a final order granting a peremptory writ. Its

hearing was postponed from time to time until December 4, 1905, at which time the case was orally argued before the Special Term, and time was then given counsel to submit written briefs. In the meantime the defendant Best resigned his position as commissioner of bridges, and thereupon, and before any decision of the motion for a peremptory writ was made, the corporation counsel of the city, upon affidavit showing the resignation of the defendant, moved the court for an order declaring the proceeding abated. Upon the hearing of this motion the Special Term found in accordance with the contention of the corporation counsel that the proceeding had abated by the resignation of Commissioner Best, and thereupon the court quashed, superseded and set aside the writ.

In the case of *People ex rel. Broderick v. Morton* (156 N. Y. 136), after discussing the question as to whether a mandamus could be issued against the governor of the state, we stated that there was another reason which must control our action in the case, and then called attention to the fact that the governor, lieutenant-governor and speaker, against whom the alternative writ had issued, had gone out of office; that their successors had been installed in office, and that the proceeding had been continued and a peremptory writ issued to the new officials without notice to them and without their having been brought in and made parties to the proceeding. We then referred to the provisions of section 755 of the Code of Civil Procedure, and stated that it may be doubted as to whether this section operates to keep the proceeding alive; but assuming for the purposes of the case that it does, and that the relator still had the right to prosecute his proceeding, it was necessary that the new officers should be given notice and brought into the proceeding so that the peremptory writ could issue to them. It will be observed that the question as to whether the proceeding abated was not determined by us in that case. We have, therefore, given the question further consideration.

Under the common law the writ of mandamus issued in the king's name to inferior courts, officers, corporations or per-

sons, requiring them to do that which was particularly specified. It did not issue to the king himself, to Parliament nor the judiciary, except such inferior courts as the higher courts had the power to review. Under the provisions of the Code of Civil Procedure the writ issues as an order of the court in the cases in which it was authorized at common law and, therefore, it cannot issue to the executive, the legislative or judicial branch of the government, except to such inferior courts as are subject to review by the judicial branch of the government having such jurisdiction. In other words, the mandamus does not issue against the government itself, and for this reason the Supreme Court of the United States has held that the proceeding abates upon the death or resignation of the officer against whom it was issued. (*Secretary v. McGarrahan*, 9 Wall. 298; *United States v. Boutwell*, 17 Wall. 604; *United States v. Chandler*, 122 U. S. 643; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28; *United States v. Butterworth*, 169 U. S. 600.)

None of the acts under consideration in these cases could be enforced by any action against the government, nor could the relief sought be obtained by a mandamus against either of the three departments of the government. The proceedings, therefore, were instituted against the officer who, by his personal conduct, action or refusal to act, had deprived the party of that to which he deemed himself entitled. The proceeding was, therefore, personal as to the officer proceeded against, and under the decisions in the cases alluded to, it abated by his death, resignation, removal or termination of his office; but in the case of a municipal corporation which could sue and be sued and against which rights of persons could be enforced, the rule was held to be different. As was stated by Mr. Justice BRADLEY in the case of *Thompson v. United States* (103 U. S. 480, 483): "We cannot accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent and the proceeding is undertaken to enforce an obligation of the

corporation or municipality, to which the office is attached. The contrary has been held by very high authority. (*People ex rel. Shurt v. Champion*, 16 Johns. 60; *People ex rel. Case v. Collins*, 19 Wend. 56; High on Extraordinary Remedies, § 38.) * * * The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office, have been those of officers of the Government whose alleged delinquency was personal and did not involve any charge against the Government whose officers they were."

In High on Extraordinary Remedies (§ 38) it is said: "Where, however, a continuing and perpetual duty is incumbent upon certain public officers the rule is otherwise. And in such case the fact that the officers hold their tenure by annual election, and that their term of office has almost expired, will not prevent the court from interfering, since the duty, being continuing in its nature, may be enforced against the officers generally and their successors. And when proceedings in mandamus are pending against a public officer, at the expiration of his term of office, to compel the performance of an official duty, it is proper to revive the proceedings against his successor in office. Indeed, such practice is regarded as necessary to the administration of justice in view of the changes which are of frequent occurrence in public offices. So when the object of proceedings in mandamus against a county officer is to enforce a right against the county through such officer, the proceedings do not abate by the expiration of the term of office. In such case the action is regarded as being against the office to compel the performance of a duty devolving upon it regardless of the incumbent. And when a peremptory mandamus has been awarded against a public officer for the performance of an official duty, but his term of office has expired and the writ has not been obeyed, the court may grant an alias peremptory writ to his successor in office for the performance of the required act."

In the case of *People ex rel. Scott v. Supervisors of Chenango* (8 N. Y. 317, 330) it was contended that the board of supervisors had no power over the subject except that at their annual

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meeting, and as they omitted to do their duty then they could not be compelled to do it at another time. With reference to this contention the court said: "Their neglect to perform their duty at the time required cannot nullify the statute. *They, or their successors*, are bound to do what was required, and on failure it may be compelled by mandamus." (See, also, *People ex rel. Dannat v. Comptroller of City of N. Y.*, 77 N. Y. 45, 50; *People ex rel. Wooster v. Maher*, 64 Hun, 408, 410, 413, 417; *People ex rel. Cunliffe v. Cram*, 30 Misc. Rep. 561; *People ex rel. Melledy v. Shea*, 73 App. Div. 232, and *People ex rel. Lazarus v. Coleman*, 99 App. Div. 88.) We, consequently, conclude that where a proceeding is against an officer of a municipality for the enforcement of a right of a relator against the municipality, the proceeding does not abate by the resignation, removal or expiration of term of the officer, but that it may be enforced against his successor or successors.

In this case it appears that the relator held a position under the municipal government of the city of New York; that he was suspended from his position by the commissioner of bridges without pay, upon the ground that his services were no longer necessary to the municipality. The relator, however, contended that this was not true and that his services were still needed by the municipality and, therefore, demanded his reinstatement. If his position was correct and the defenses interposed were not established upon the trial, his right to hold the position under the municipality was existing and continuous, and was one which we think he had the right to enforce against the municipality by continuing his proceeding against the successor to the defendant.

As bearing upon the question as to whether a continuance is necessary, it appears that the application for a peremptory writ had been made to the court and argued, but written briefs were to be submitted, and consequently no decision had been rendered. We think that inasmuch as something remained to be done by the parties to the litigation, that briefs were to be prepared and filed and a decision rendered, that the substitution of the successor in office was necessary.

While the Code may not specifically provide the practice for substituting officers of this character, that which is provided by section 1930 of the Code, which is analogous in similar cases, met the approval of this court in the case of *People ex rel. Broderick v. Morton* (*supra*).

The order should be reversed and the motion to have the proceedings declared abated denied, with costs in all courts.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. IRVING K. FARRINGTON, Appellant, v. LOUIS MENSCHING, a Peace Officer of the County of New York, Respondent.

1. CONSTITUTIONAL LAW—STOCK TRANSFER TAX ACT (L. 1906, CH. 414, § 1) INVALID AS AN ARBITRARY DISCRIMINATION IN FAVOR OF ONE AS AGAINST ANOTHER OF THE SAME CLASS. Section 1 of chapter 414 of the Laws of 1906, which purported to amend the Stock Transfer Tax Act (section 315 of the Tax Law, as amended by chapter 241 of the Laws of 1905), and imposes a tax of two cents "on each share of one hundred dollars of face value or fraction thereof," instead of "on each hundred dollars of face value or fraction thereof," as provided by the act of 1905, taxes the sale of all shares of the face value of one hundred dollars and also all shares of the face value of any fraction of one hundred dollars; the tax is measured by the number of shares regardless of face value, instead of by the face value of the shares sold, i. e., the sale of one hundred shares of the face value of ten dollars is taxed two dollars, while the sale of ten shares of the face value of one hundred dollars is taxed twenty cents, the shares sold in each case being worth the same amount. All corporate shares are placed in a class, but all members of the class are not treated alike; without method or order or reason the statute bears heavily upon some and lightly upon others in the same situation. This is not classification but arbitrary or accidental selection. While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. The taxing clause of the act of 1906 must be regarded as an arbitrary discrimination in favor of one as against another of the same class, is a violation of primary rights and as such it is unconstitutional and void.

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Statement of case.

2. STOCK TRANSFER TAX ACT (TAX LAW, § 315; AMD. BY L. 1905, CH. 241) NOT AFFECTED BY UNCONSTITUTIONALITY OF ACT OF 1906. A contention that although the amendment is void, it may be regarded as valid for the purpose of substitution or repeal cannot be sustained. A valid statute cannot be annulled by a void amendment. A statute is never repealed by implication when a provision of a later act which would otherwise effect a repeal is unconstitutional and void. The taxing clause of the act of 1906 being unconstitutional, the taxing clause of the act of 1905, which it purported to amend, was not repealed, modified or in any way affected.

3. VALIDITY OF WARRANT OF ARREST CHARGING VIOLATION OF STATUTE. A warrant of arrest charging the relator in habeas corpus proceedings with his failure to affix any stamp or pay any tax upon a sale of stock certificates by him, "in violation of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906," is valid, although it recites the void statute, where the relator attacks the latter as void, and he is presumed to have known that, if void, the former statute must be operative, and hence he could not be misled. Especially is this true in this case, since the act of 1906 was not altogether void. Section 2 thereof amended section 317 of the act of 1905, relating to the penalty for a failure to pay the tax, and the warrant does not refer to the section violated, but to that part of the act which was valid.

People ex rel. Farrington v. Menschling, 115 App. Div. 898, affirmed.

(Argued November 19, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 19, 1906, which affirmed an order of Special Term, dismissing a writ of habeas corpus.

On the first of August, 1906, the relator was arrested by the respondent under a criminal warrant, which charged that "on the 26th day of July, 1906, at the city of New York, in the county of New York, one Irving K. Farrington did sell and deliver to Donald C. Catlin certificates of stock without making any memorandum of sale and without affixing any stamp or stamps and without the payment of any tax in violation of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906." The affidavit upon which the warrant was issued was made by Donald C. Catlin, who alleged that he resided in the city of New York; that he was a broker by occupation and had an office on Wall street

in that city; that on the 26th of July, 1906, the relator, a resident of the state of New Jersey, sold to him in the borough of Manhattan the following shares of stock, to wit: "A certificate for 1,000 shares of the capital stock of The Old Gold Mines Company, a corporation organized and existing under and by virtue of the Laws of the State of Wyoming; that the par value of said stock is one cent (\$.01) per share; that said stock was so issued by said company under and pursuant to the Laws of the said State of Wyoming; and that the sale thereof by said Farrington to deponent was for the sum of thirty (\$30) dollars in cash, at the rate of three cents (\$.03) per share, that being the then market value of said stock and to the best of deponent's knowledge, information and belief the actual value thereof.

"A certificate for 1,500 shares of the capital stock of the Black Butte Mining Company, a mining corporation organized and existing under and by virtue of the laws of the State of Maine; that the par value of said stock is ten cents per share; that the said stock was so issued by said company under and pursuant to the Laws of said State of Maine; and that the sale thereof by said Farrington to deponent was for the sum of \$105 in cash, at the rate of seven cents (\$.07) per share, that being the then market value of said stock and to the best of deponent's knowledge, information and belief the actual value thereof.

"A certificate for 1,000 shares of the capital stock of the Goldfield Blue Bell Mining Company, a mining corporation organized and existing under and by virtue of the Laws of the Territory of Arizona; that the par value of said stock is one (\$1) dollar per share; that said stock was so issued by said company under and pursuant to the Laws of the Territory of Arizona; and that the sale thereof by said Farrington to deponent was for the sum of twenty (\$20) dollars in cash, at the rate of two cents (\$.02) per share, that being the then market value of said stock and to the best of deponent's knowledge, information and belief the actual value thereof.

"A certificate of 1,000 shares of the capital stock of The

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Mergenthaler-Horton Basket-Machine Co., a corporation organized and existing under and by virtue of the Laws of the State of Maine; that the par value of said stock is one (\$1) dollar per share; that said stock was so issued by said company under and pursuant to the Laws of said State of Maine; and that the sale thereof by said Farrington to deponent was for the sum of one hundred and forty (\$140) dollars in cash, at the rate of fourteen cents (\$.14) per share, that being the then market value of said stock and to the best of deponent's knowledge, information and belief the actual value thereof; that said corporation is engaged in the business of manufacturing fruit baskets and other baskets."

The complainant further alleged that, pursuant to such sale, he paid the relator the sum of \$295, the total purchase price of such shares, and that the latter delivered to him certificates representing the same, but without affixing "any stamp or stamps and without paying any tax on making said sale or sales and delivery, although requested by the deponent so to do, in violation of the provisions of" said act of 1905, as amended by said act of 1906.

The relator alleged in his petition for the writ that he was restrained of his liberty by the respondent under said warrant issued upon said affidavit, and that his detention was illegal, because the magistrate was without jurisdiction to issue the warrant or cause his arrest, inasmuch as chapter 414 of the Laws of 1906 is unconstitutional, and also because said act does not apply "to the transfer of shares of stock whose par value is less than \$100." The return of the respondent was in substance that he had arrested and detained the relator by virtue of the warrant issued upon said affidavit, and "that further than this there is no cause or reason for the detention of the relator known to me." On the second of August, 1906, the Supreme Court at Special Term dismissed the writ and remanded the relator to custody. Upon appeal to the Appellate Division the order dismissing the writ was unanimously affirmed, and thereupon the relator appealed to this court.

Horace E. Parker for appellant. The statute is in violation of section 1 of article 14 of amendments of the Constitution of the United States, in that it denies to the petitioner within the jurisdiction of the state of New York and to other persons in said jurisdiction in like circumstances the equal protection of the laws in that those desiring to exercise their inherent, inalienable rights and privileges to contract for the purchase and sale of stocks of a low par value is taken away; and traders in stocks having a low par value are charged a larger percentage than those dealing in stocks of a par value of \$100. (*Matter of Pell*, 171 N. Y. 48; *Cooley on Taxn.* 596; *People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *Pollock v. F. L. & T. Co.*, 157 U. S. 429; *Barbier v. Connolly*, 113 U. S. 27; *B. G. R. R. Co. v. Penn.*, 134 U. S. 232; *M. C. R. R. Co. v. Powers*, 201 U. S. 245; *Kentucky R. R. Cases*, 115 U. S. 321; *Magoun v. I. T., etc., Bank*, 170 U. S. 283; *A. P. Co. v. Lacy*, 200 U. S. 226; *Nicol v. Ames*, 173 U. S. 509.) The act may be construed as providing for a tax only in respect of shares of stock the par value of which is \$100. (*Matter of McPherson*, 104 N. Y. 306; *Matter of Romaine*, 127 N. Y. 80; *Matter of Enston*, 113 N. Y. 134; *Whitfield v. A. L. Ins. Co.*, 144 Fed. Rep. 356.)

Louis Marshall for the New York State Brokers' Association, intervenors. If the act of 1906 is applicable to transfers of shares having a par value of less than \$100, the act is unconstitutional, in that it denies to the transferrors of such stock the equal protection of the law within the meaning of the fourteenth amendment of the Constitution of the United States. While it is undoubtedly within the legislative power to classify the subjects of legislation, such classification cannot be predicated upon the exercise of arbitrary and capricious power over persons and property. The classification must be such as in the nature of things suggests and furnishes a reason and justifies the making of the class. The reason must inhere in the subject-matter, and must be natural

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and not artificial. Neither mere isolation nor arbitrary selection is proper classification. (*G., C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150; *Cotting v. K. C. S. Co.*, 183 U. S. 79; *Connolly v. U. S. P. Co.*, 184 U. S. 540; *Matter of Pell*, 171 N. Y. 48; *People v. O. C. R. C. Co.*, 175 N. Y. 84; *Ruhrstrat v. People*, 185 Ill. 183; *People ex rel. McPike v. Van De Carr*, 91 App. Div. 20; 178 N. Y. 425; *Wright v. Hart*, 182 N. Y. 330; *People v. Beattie*, 96 App. Div. 383; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103.) Assuming, however, that the act of 1906, is constitutional, then under the rules applicable to the interpretation of fiscal legislation, which is highly penal in its scope, the words "or fraction thereof," as contained in the act of 1906, must be construed as referring to the antecedent unit of taxation, to wit, each share of stock having a face value of \$100, and not to any other shares. (Maxwell on Interp. of Stat. [3d ed.] 401; *Partington v. Attorney-General*, L. R. [4 H. L.] 122; *Matter of Thorley*, L. R. [2 Ch. Div. 1891] 613; *Shaw v. Rudin*, 9 Ir. C. L. 214; *Queen v. Mallow Union*, 12 Ir. C. L. 35; *Cox v. Rabbits*, L. R. [3 App. Cas.] 473; *Oriental Bank v. Wright*, L. R. [5 App. Cas.] 842; *United States v. Wigglesworth*, 2 Story, 669; *United States v. Watts*, 1 Bond, 580; *Powers v. Barney*, 5 Blatch. 202; *United States v. Isham*, 17 Wall. 496.) If section 1 of chapter 414 of the Laws of 1906 is unconstitutional and void, then section 315 of the Tax Law as enacted by chapter 241 of the Laws of 1905, is left in full force. (*Campau v. Detroit*, 14 Mich. 276; *Devoy v. Mayor, etc.*, 35 Barb. 264; 36 N. Y. 449; *Harbeck v. Mayor, etc.*, 10 Bosw. 366; *People v. Tiphaine*, 3 Park. 241; *Matter of Cullinan*, 97 App. Div. 122; *W. P. O. Co. v. Texas*, 177 U. S. 28; *Sullivan v. Adams*, 3 Gray, 476; *Judson v. City of Bessemer*, 87 Ala. 240; *Randolph v. B. P. S. Co.*, 106 Ala. 501; *People v. B. S. F. & I. Co.*, 201 Ill. 236.) Assuming that section 315 of the Tax Law of 1905 was in effect at the time of the act for which the relator was arrested, the affidavit and warrant do not sufficiently charge an offense against the provisions of

that act, since it was evident that the crime charged was a violation of the act of 1906, the reference to the statute being a material part of the charge. (*People v. Harris*, 28 N. Y. S. R. 300; *People v. Dumar*, 106 N. Y. 502; *People v. Klipel*, 160 N. Y. 374; *People v. Flaherty*, 162 N. Y. 542; 1 Bishop's New Cr. Proc. [4th ed.] § 602; *United States v. Smith*, 2 Mason, 143; *Green v. City of Indianapolis*, 25 Ind. 490; *McCulloch v. Comm.*, 3 Ky. 95; *Comm. v. Macuboy* 33 Ky. 70; *Pike v. Comm.*, 63 Ky. 89; *State v. Sherburne*, 58 N. H. 159.)

William Travers Jerome, District Attorney (*E. Crosby Kindleberger* of counsel), for respondent. The change made by the act of 1906 is a change only in the measure of the tax, not a change in the method or principle of taxation. The amendment, therefore, even if different from the act of 1905, by broadening the scope of the act makes it less liable to criticism as being designed to tax the transfer of but a small part of the personal property of the state. By extending the property included within its power to that extent it destroys the objections that it is denying the equal protection of the law. (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *M. C. R. R. Co. v. Powers*, 201 U. S. 245; *Clark v. Titusville*, 184 U. S. 329; *B. G. R. R. Co. v. Penn.*, 134 U. S. 232; *Jennings v. C. R. I. Co.*, 147 U. S. 147; *M. & M. Bank v. Penn.*, 167 U. S. 461; *U. S. v. Thomas*, 115 Fed. Rep. 207.) By failing to pay any tax whatever the relator has violated the act of 1905, and his arrest was lawful without regard to the act of 1906. (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431.)

Julius M. Mayer, Attorney-General (*Horace McGuire* of counsel), for respondent. The act does not confiscate the property of the relator; it does not deprive him of his property without due process of law, and it does not deny to him equal protection of the laws. (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *Matter of McPherson*, 104 N. Y. 306.)

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VANN, J. The Tax Law, as amended by chapter 241 of the Laws of 1905, imposed a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." (§ 315.)

By chapter 414 of the Laws of 1906, section 315 was amended "to read as follows," that is, the original section was repeated in *hæc verba*, except that the words "share of one" were inserted in the taxing clause, so as to impose a tax "on each *share of one* hundred dollars of face value or fraction thereof," instead of on "each hundred dollars of face value or fraction thereof." There was no repealing clause, general or special, and the original section was left unchanged except as stated and except also that two unimportant verbal changes were made and the following sentence was added at the end of the section: "The comptroller may, upon satisfactory proof that stamps have been erroneously affixed and cancelled in payment of the tax upon a transfer and to the loss of an innocent person, refund the amount thereof from appropriations made for necessary expenses under this act, provided the tax justly due is paid upon such transfers." Section 317, relating to the "penalty for failure to pay taxes," and section 321, relating to the "power of State comptroller," were also amended, but not so as to have any material bearing upon the questions discussed in this opinion. The amended act "became a law" on the 11th of May, 1906, and took effect immediately.

What did the legislature mean by imposing the tax "on each share of one hundred dollars of face value or fraction thereof?" Do the words "fraction thereof" qualify the word "share," or the words "one hundred dollars?" Does the fraction relate to the "share" or to the amount? Does the section have the same meaning as if it read "on each share of the face value of one hundred dollars, and on each share of the face value of a fraction of one hundred dollars,"

or as if it read "on each share of the face value of one hundred dollars and on any fraction of a share?"

We think the intention was to tax the sale of all shares of the face value of one hundred dollars, and also all shares of the face value of any fraction of one hundred dollars. The structure of the sentence indicates a change in the unit of taxation from a certain amount of face value to a share, whether large or small. The theory that the legislature intended to tax shares of the face value of one hundred dollars and leave all others untaxed, although plausible, impresses us as unsound. This would exempt shares with a face value of \$99 and less, and \$101 and more, including those with a face value of \$5,000, of which we recently had an instance before us. (*Matter of Brandreth*, 169 N. Y. 437, 439.) According to the record "not less than five million shares of stock" with a face value of less than one hundred dollars a share are sold each year within the county of New York, and the number of corporations issuing the same exceeds two thousand.

Either construction, however, raises the question as to the power of the legislature to make a classification so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason to justify it.

We adhere without qualification to the decision made when the act of 1905 was before us and broadly indorse the reasons given to support the judgment then rendered. (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431.) We held that "The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others," provided "all persons and property in the same class are treated alike" and "the tax is imposed equally upon all property of the class to which it belongs." In discussing the subject we said that: "While a tax upon a particular house or horse, or the houses or horses of a particular man, or on the sale thereof would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leav-

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ing sheep and cows untaxed, however unwise, would be within the power of the legislature. * * * The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances.' (*Kentucky Railroad Tax Cases*, 115 U. S. 321, 337.) Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' (*Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Hayes v. Missouri*, 120 U. S. 68; *Barbier v. Connolly*, 113 U. S. 27, 32.)"

The act of 1905, to which these remarks applied, made no discrimination between the shares of different corporations founded on the accident of the amount for which they were issued, but taxed on the basis of a uniform amount of face value as the standard. The tax was measured by one hundred dollars of face value, ascertained by counting the shares, if issued for exactly that amount; by dividing each share into multiples of one hundred dollars, if issued for more, and by adding the face values and dividing the result into multiples of that sum, if issued for less.

The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification. Thus it imposes the same tax on the sale of dollar shares and hundred dollar shares. The tax is measured by the number of shares, regardless of face value or actual value. Shares of the same corporation might be taxed ten times as much, or only one-tenth as much, in one year as compared with the next, if simply the face value of each share were changed, without changing the aggregate of the face value of all the shares, or the amount of capital invested, or the value of the assets in which it was invested. Shares are so classified as to tax the sale of those

issued by one corporation several times as much as those issued by another of the same kind and in exactly the same situation, without any reason for the distinction. Possibly a valid distinction might be founded on the nature or object of the corporation, or on the fact that it enjoyed special privileges, putting banking and railroad corporations in and leaving manufacturing corporations out, for instance, but we think none can rest on an accidental and non-essential quality without the violation of fundamental principles. While the legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one. While the state can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the state and those selling at retail within the state was sustained on the ground that the two occupations are distinct (*Cook v. Marshall County*, 196 U. S. 261, 274), but could dealers in any commodity be classified according to age, size or complexion. A classification of sales into those made in an exchange and those made elsewhere was sustained in another case, but could

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exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? (*Nicol v. Ames*, 173 U. S. 509.) Perhaps an answer to these questions may be found in *Cotting v. Kansas City Stock Yard Co.* (183 U. S. 79), where a general act, the effect of which was to so classify stockyards in the state of Kansas as to discriminate against the largest stockyard in the state, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another state, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. (*State ex rel. Trustees v. Township, etc.*, 36 N. J. Law, 66.) Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give "that equal protection and security" to which all, under like circumstances, are entitled "in the enjoyment of their personal and civil rights." (*Barbier v. Connolly*, 113 U. S. 27; *Matter of Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377.)

By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest disregard of justice and principle. The same person may own one-tenth of all the shares of both, yet on the sale of all his stock in both, his tax on the one would be twice that upon the other,

although his proportionate ownership of the property of the corporation would be the same in each. While the sale of all shares is taxed an equal amount per share, the tax is unequal when the shares are issued for different amounts and the record shows a wide range in that respect. The Business Corporations Law requires shares to be not less than \$5 and not more than \$100 each. (L. 1890, ch. 567, § 2.) Other corporations do not appear to be limited in this regard. Perhaps a face value of one hundred dollars is the most common, but shares of fifty dollars are not unusual and shares of more than one hundred dollars are occasionally issued. In mining stocks, the shares generally range from one dollar to ten. According to the petition upon which the writ before us was issued, they are sometimes as low as ten cents and even down to one cent, although the amount last named suggests an attempt to make a case for the purpose of overthrowing the statute, which would ordinarily lead us to dismiss the appeal and leave the appellant to a review after a trial when the facts could be fully developed, but the importance to the state and to business men of a prompt decision induces us to decide the question at once. (*Riggins v. United States*, 199 U. S. 547; *New York v. Eno*, 155 U. S. 89; *In re Wood*, 140 U. S. 278; *In re Duncan*, 139 U. S. 449; *Ex parte Royall*, 117 U. S. 241.)

The serious objection to the statute under consideration is not that in some abnormal instance of low face value the tax might amount to confiscation, but that the classification is as purely arbitrary as the division of land into fields to which we have alluded. Granting the almost unlimited power of the legislature to classify as it sees fit, still there is no plausible or possible reason why one hundred acres in a single field should not pay the same tax as one hundred acres of equal value in ten fields. It seems equally clear that no distinction in liability to taxation can be drawn between ten shares of the face value of one hundred dollars each and one hundred shares of the face value of ten dollars each. If the corporations have equal assets and are equally successful, the two

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lots of shares are exactly the same thing. Suppose the entire capital is one hundred thousand dollars, ten shares of one hundred dollars each, or one hundred shares of ten dollars each, would represent the same proportion of the corporate property. In other words the fraction representing the equitable ownership would be exactly the same in each case.

While it is true that the face value, which in multiples of one hundred dollars we held in the *Hatch* case to be a proper basis of classification, does not necessarily indicate actual value, still it bears some relation thereto, but a share apart from its size or face value can bear no relation whatever to its actual value. The classification was arbitrary, which "can never be justified by calling it classification." (*Gulf, Colorado & Santa Fé Railway Co. v. Ellis*, 165 U. S. 150.) There was no basis for the distinction made, no difference bearing even a colorable relation to the classification attempted. (*Matter of Pell*, 171 N. Y. 48; *People v. Orange County Road Constr. Co.*, 175 N. Y. 84, 89; *Cooley on Taxation*, 596.) The owners of corporate stocks do not stand on an equal footing under the statute. They do not receive the equal protection thereof, for some have to pay more than others in the same situation. Thus, if A. sells one hundred shares of the face value of \$10 each for \$1,000, he is taxed \$2; while B., who sells ten shares of the face value of \$100 each for \$1,000, is taxed twenty cents, the thing sold in each case being worth the same amount. This is not classification but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some and lets others go. The rule governing the subject, as laid down by the Supreme Court of the United States, is that there must be "some difference which bears a reasonable and proper relation to the attempted classification." It cannot be "mere arbitrary selection." (*Kentucky R. R. Tax Cases*, 115 U. S. 321, 337; *Yick Wo v. Hopkins*, 118 U. S. 356; *Gulf, Colorado & Santa Fé Ry. v. Ellis*, *supra*; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294; *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232; *Nicol v. Ames*, 173 U. S. 509, 521; *Cotting v. Kansas City*

Stock Yards Co., 183 U. S. 79, 111; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560; *Michigan Central R. R. Co. v. Powers*, 201 U. S. 245, 293.)

By this we do not understand that great court to mean that the relation must necessarily be "reasonable and proper" according to the judgment of reviewing judges, but that the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, there must be enough reason for it to support an argument, even if the reason is unsound. At all events that is as far as it is necessary for us to go in this case, where no reason whatever can be seen for selecting certain individuals of a class and taxing them more heavily than others in the same situation. We regard this as an arbitrary "discrimination in favor of one as against another of the same class," and as a violation of primary rights. We are thus compelled to hold that the amendment of the taxing clause in section 315, as enacted by chapter 414 of the Laws of 1906, is unconstitutional.

As the taxing clause of the last act is void, what effect does it have on the taxing clause in the first act? Can a valid statute be annulled by a void amendment?

A section in a later act amending a section in an earlier act, "so as to read as follows," if followed by a blank space only, would effect no change in the law. That is the legal effect of the situation before us, so far as the question now involved is concerned. The section of 1906 is void, at least in the respect mentioned, and a void thing is no thing. It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. In the eye of the law it is merely a blank, the same as if the types had not reached the paper. It neither repealed nor substituted, for as it is void it could do neither. It is folly to argue as to the intent of a section which the Constitution blotted out the instant that the rest of the statute became a law. It never came into existence so as to have an intention. "An unconstitutional act is not a law; it confers no rights; it imposes no duties;

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it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." (*Norton v. Shelby County*, 118 U. S. 425, 442.)

The main argument of the appellant is founded on the theory that the section, although void because it violates the Constitution, is valid for the purpose of substitution or repeal, whereas it is valid for no purpose whatever. We assume that the later section, if valid, would do away with the earlier, either by implied repeal or by substitution, which is an implied repeal and something more, but as it is void the command of the legislature was neutralized by the command of the Constitution, *eo instante*. The new section never breathed. Instead of blotting out the earlier it was blotted out itself. Instead of amending "so as to read as follows" it did not amend in any respect. Conceding that the two sections cannot stand together, still the earlier is the only one that ever stood at all.

There was no express repeal of the act of 1905 or any part thereof. The two acts were enacted by different legislatures and, therefore, it "cannot be said that the original act would not have been passed except for the amendment." (*Ex parte Davis*, 21 Fed. Rep. 396.) The general rule is that a statute is never repealed by implication when a provision of a later act which otherwise would effect a repeal is unconstitutional and void. (*Devoy v. Mayor, etc., of New York*, 35 Barb. 264, 270; 36 N. Y. 449, 451; *Hasbeck v. Mayor*, 10 Bosw. 366; *People v. Dooley*, 171 N. Y. 74; *Campau v. Detroit*, 14 Mich. 276; *Sullivan v. Adams*, 3 Gray, 476; *Randolph v. Builders & P. Supply Co.*, 106 Ala. 501; *State ex rel. Wilmot v. Buckley*, 60 Ohio St. 273; *State ex rel. Law v. Blend*, 121 Ind. 514; *State ex rel. Rogers v. County Court*, 11 Wis. 50; *Childs v. Shower*, 18 Ia. 261; Endlich's Interpretation of Statutes, § 195; Sedgwick's Stat. & Cons. Law, 110, n.; 26 Am. & Eng. Encyc. [2nd ed.] 712, 719, 723; Cooley's Const. Lim. 259; Sutherland on Stat. Cons. § 175.)

An earlier case in Indiana (*Meshmeier v. State*, 11 Ind. 482) was overruled by *State ex rel. Law v. Blend* (*supra*) which holds that where it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, intended to repeal

the former statute upon the same subject, except upon the supposition that the new act would take the place of the old one, the repealing clause, even when express in terms, falls with the act of which it is a part. In the later case the repeal was in form of "all laws and parts of laws coming in conflict with this act" as well as a specific repeal of an act named. (L. 1889, Indiana, ch. 112.)

As was said by the Supreme Court of Illinois with reference to an attempted amendment of the Anti-trust Law of that state: "The amendment of 1897 does not, in terms, repeal section one of the statute of 1891. If any part of the Act of 1891 is repealed, it must be a repeal by implication and because the amendment is in conflict with the original act or a part thereof. But the amendment is unconstitutional and void. It, therefore, repealed no part of the act upon which it was fruitlessly sought to be engrafted as an amendment." (*People ex rel. Akin v. Butler Street Foundry & Iron Co.*, 201 Ill. 236.)

The Supreme Court of Michigan, after holding that a later act purporting to amend an earlier was unconstitutional, through Judge COOLEY said: "The Act of 1865 (the later) contains many other provisions, the validity of which is not disputed so far as we are informed, and the last section repeals all acts and parts of acts inconsistent with its provisions. The plaintiff in error contends that, even if the sections which relate to a jury are invalid, the last section must still have the effect to repeal the original section. If the repealing clause had in express terms repealed certain acts and parts of acts by name and the act had then gone further and attempted to substitute unconstitutional provisions, the argument which has been made would be more plausible than it seems to us now. But the repealing clause here in question is distributive in its application to each section of the act and neither in words nor in apparent design undertakes to repeal any acts or parts of acts, except those which would come in conflict with the provisions it attempts to substitute. The repeal was simply to displace all conflicting provisions, so that these could have full effect. But nothing can come in

conflict with a nullity and nothing is, therefore, repealed by this act on the ground solely of its being inconsistent with a section of this law, which is entirely unconstitutional and void. (*Sullivan v. Adams*, 3 Gray, 476; *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *State v. Judge of County Court*, 11 id. 50; *Tims v. State*, 26 Ala. 165.)”

The so-called Trust Law of the state of Texas, passed in 1889, was amended by the act of 1895, entitled “An Act to define trusts * * * and to repeal all laws and parts of laws in conflict with this act.” The Supreme Court of the United States held that the earlier act was not repealed by the later, and closed its argument by saying: “In other words, as to that act (the later), the situation is this: It is either constitutional or unconstitutional. If it is constitutional, the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not affect the act of 1889, and that, as we have seen, imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the state to forfeiture.” (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 47.)

Even where there is a repealing clause in a statute, a portion of which is unconstitutional, such clause “is applicable only to laws inconsistent with its operative provisions.” (*Devoy v. Mayor, etc., of New York*, 36 N. Y. 451.)

We have recently decided the precise question in a case of public interest which received careful consideration. (*People v. Dooley*, 69 App. Div. 512; 171 N. Y. 74.) The Greater New York charter passed in 1897 provided that the city magistrates throughout the entire city should be appointed by the mayor and hold office for a term of ten years. In 1901 the charter was amended so as to provide that at the ensuing general election there should be elected in each congressional district of the borough of Brooklyn one city magistrate and in the territory constituting that borough, two city magistrates at large for a term of six years commencing on the first day of January, 1902. At the first election held after the passage of the amended act one magistrate was

elected in each of the six congressional districts within the borough of Brooklyn and two in the borough at large. A controversy arose between the magistrates thus elected under the amended act and certain magistrates who had been appointed by the mayor under the original act after the amendment of 1901 went into effect. An action in the nature of quo warranto was brought by the attorney-general upon his own information to determine the question between the conflicting claimants. It was held that the provisions of the later act, making the magistrates elective instead of appointive, were unconstitutional; that the repealing clause was so connected with the unconstitutional provisions as to fall with them and that the provisions of the original act making the magistrates appointive were not repealed but stood in full force as if the later act had never been passed. This is the effect of the decision as we read the opinions of this court in connection with the prevailing opinion in the Supreme Court and the record which presented the questions to be decided.

We think, both upon principle and authority, that as the taxing clause of the act of 1906 is unconstitutional, the taxing clause of the act of 1905 was not repealed, modified or in any way affected.

Was the warrant valid, even if it recited both statutes in describing the offense? The essential part of the description was the failure of the relator to affix any stamp or pay any tax upon the sale of stock certificates by him to Catlin, the complainant. This was fully set forth. If the description had closed by saying, "in violation of the statute in such case made and provided," it would have met every criticism made by counsel. Instead of this, it said "in violation of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906." The act of 1906 we have held unconstitutional as to the taxing clause, which left the act of 1905 in full force in that respect. If the reference to the void statute were rejected as a blank, or as surplusage, it could not have surprised the relator for he expressly stated in his petition for the writ that the later act was unconstitutional and

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void. When the affidavit upon which the warrant was issued is read, as the relator read it, in connection with the warrant itself, it clearly sets forth an offense under the valid act, but, as it must be conceded, it would also set forth an offense under the void act, if a void act could create an offense. As the relator is presumed to know the law, he is presumed to have known that the legal effect of the warrant was to charge him with a violation of the only operative statute referred to, because a reference to a void act is no reference at all. The warrant must "state an offense" (Code Cr. Pro. § 152), and the one before us would have stated an offense even if no statute had been referred to, *contra formam statuti* or its equivalent, is not essential. The valid statute, however, was recited and the recital of the void statute was the recital of a nullity which, while it might mislead, could have no other effect. It did not mislead the relator, for he swore that the act of 1906 was void and he knew, as we must presume, that the act of 1905 was still in force.

There is another view, however, which makes the reference entirely proper. The act of 1906 although void as to the taxing clause in section 315 was not altogether void. Thus section 317, which relates to the penalty for a failure to pay the tax, was amended by the act of 1906 by adding to the word "sale" the words "or transfer" in one place and the words "or agreement to sell" in another. The warrant does not refer to the section violated, but to the statute violated, and, hence, the effective reference to the act of 1906 was to the part that is valid, which, as it related to the penalty, was quite appropriate.

The ordinary writ of habeas corpus is limited in its inquiry to questions of jurisdiction and power. "Where the mandate is defective in a matter of substance required by law rendering it void," or where, although in proper form, it "was issued in a case not allowed by law," the prisoner must be discharged. (Code Civ. Pro. § 2033.) No inquiry into the "legality or justice" of any mandate is permitted, except as those terms include questions of jurisdiction or power.

(Id. § 2034; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *People ex rel. Young v. Stout*, 63 N. Y. S. R. 152; 144 N. Y. 699; 1 Fiero's Special Proceedings, 59.) The magistrate who issued the warrant before us had jurisdiction of the subject matter and of the person and, as we think, the warrant was "not defective in a matter of substance required by law" so as to render it void. (*Pratt v. Bogardus*, 49 Barb. 89; 22 Encyc. Pl. & Pr. 1080.)

The order appealed from should be affirmed.

CULLEN, Ch. J., HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, JJ. (and GRAY, J., in result), concur.

Order affirmed.

ALLEN L. WOOD, Appellant, v. HYMAN SNIDER, Respondent.

DOMESTIC ANIMALS — COMMON-LAW RULE OF LIABILITY OF OWNER OF ANIMALS FOR TRESPASSES THEREOF — EXCEPTIONS TO RULE — WHEN OWNER LIABLE FOR TRESPASSES OF ANIMALS LAWFULLY DRIVEN ALONG PUBLIC HIGHWAY. Under the common law every owner of domestic animals is liable for their trespasses upon the lands of others, whether such lands are inclosed or not, except in two instances: (1) A person lawfully driving domestic animals along a public highway, who exercises due care in so doing, is not liable for injuries which they do by escaping from his control upon lands abutting upon the highway, if the animals are pursued and promptly removed, since such casual trespassing, although wrongful, is an inevitable incident to the right to use the highway, and if the owner of lands adjoining a highway leaves the same wholly unfenced, he thereby adds to the possibility of such casual trespass; and (2) where the owner of lands, choosing to let them lie open, shall serve upon the owners of adjoining lands written notice to that effect, the owners thereof shall not be liable for damages done by animals lawfully upon their premises going upon the lands so lying open or upon any other lands of the owner thereof through such lands so lying open (*The Town Law*, L. 1890, ch. 569, § 100 [as amd. by L. 1892, ch. 92] and § 101); but when cattle, being driven along a public highway, cross unfenced lands abutting upon the highway and trespass upon other unfenced lands adjacent thereto, but not abutting on the highway, the owner of such animals is liable for the damages caused thereby, notwithstanding there was no fence between such lands and the lands lying between them and the highway, since the owner of the lands so trespassed upon did not, by leaving his lands

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unfenced, take the chances, without the right of recovery, for trespasses by cattle wrongfully upon the lands adjoining the highway and between the highway and his lands.

Wood v. Snider, 108 App. Div. 168, reversed.

(Argued October 25, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1905, affirming a judgment of the Monroe County Court, which affirmed a judgment of a Justice's Court dismissing the complaint.

The defendant and six other persons owned forty or fifty cattle in severalty, which were being driven along a public highway toward a slaughter house. The cattle were attended by their owners and others and without negligence on the part of the attendants they escaped from the highway and crossed the lands of one B. a distance of ten or twelve rods to and upon the lands of the plaintiff, a nurseryman, and thereby did the plaintiff substantial damage. They were immediately pursued by the attendants and driven from the plaintiff's land. No fence was maintained by B. between said highway and his lands, and no division fence was maintained between the lands of B. and the plaintiff. The defendant owned ten of said cattle. The plaintiff brought this action in Justice's Court to recover his said damages, and he insists that he is entitled to a judgment for such part of his damages as the number of defendant's cattle bears to the whole number of cattle that trespassed upon his lands. The defendant obtained a judgment in Justice's Court dismissing the plaintiff's complaint and such judgment was affirmed on appeal to the County Court of Monroe county, and on a further appeal to the Appellate Division. An appeal is taken to this court by leave of said Appellate Division.

Richard E. White for appellant. It is the duty of the owner of animals to restrain them from entering upon the premises of others. If he fails to do so, he is liable to respond

in damages for the injury done. (*Phillips v. Covel*, 79 Hun, 210; *Angell v. Hill*, 45 N. Y. S. R. 83; *T. R. R. Co. v. Munzer*, 5 Den. 255; *Cowles v. Balzer*, 47 Barb. 562.) The only exception to the rule is that where cattle are being driven along the highway and are properly managed, and they escape into unfenced land immediately adjoining the highway, the owner of the said land cannot maintain an action for damages, provided the cattle are driven from his land within a reasonable time. (*Tillett v. Ward*, L. R. [10 Q. B. D.] 11; *Goodwin v. Chevely*, 4 H. & N. 631; *T. R. R. Co. v. Munger*, 5 Den. 255; *Rightmire v. Shepard*, 36 N. Y. S. R. 768; 1 Arch. N. P. 535; Ingham Law of Animals, 280-282; 2 Waterman on Trespass, § 872.) The exception stated does not apply to the facts of this case, because the trespass was committed, not upon land which adjoined the highway, but upon land which was back of or beyond the land adjoining the highway. (*Harvey v. Gulson*, Noy, 107; *McConnell v. Pittsfield R. R. Co.*, 115 Mass. 564; *Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33; *Lord v. Wormwood*, 29 Maine, 282; Ingham Law of Animals, 280; Waterman on Trespass, § 872.)

George E. Warner for respondent. As a matter of law, the defendant cannot be held liable for any damage sustained by the plaintiff. (*Rightmire v. Shepard*, 36 N. Y. S. R. 768; *Rush v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33; *McDonald v. P. R. R. Co.*, 115 Mass. 564.)

CHASE, J. In deciding whether the plaintiff is entitled to recover the damages done by the cattle as alleged it is necessary to consider the rules or principles which have long been established relating to the possession of real property by its owner.

Every person whose rights are unaffected by some statute, contract or prescription is entitled to the possession of his real property undisturbed and unmolested by others.

Every man's land is in the eye of the law inclosed and set apart from another's either by visible and material fences or

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by an ideal, invisible boundary, and in either case every entry or breach carries with it some damages for which compensation can be obtained by action. (Waterman on Trespass, vol. 2, sec. 873.)

By the common law it was as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall. (Cooley on Torts [3d ed.] 684.)

At common law every person was bound at his peril to keep his cattle within his own possessions, and if he failed to do so he was liable for their trespasses upon the lands of another whether the lands trespassed upon were inclosed or not. (Ingham on Animals, 258; Cooley on Torts, *supra*; 2 Am. & Eng. Encyc. of Law [2d ed.] 351; 2 Cyc. 392; Cowen's Treatise [4th ed.] sec. 536; *Bush v. Brainard*, 1 Cowen, 78 [see note]; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; *Stafford v. Ingersol*, 3 Hill, 38; *Hardenburgh v. Lockwood*, 25 Barb. 9; *Angell v. Hill*, 45 N. Y. S. R. 83; *Wells v. Howell*, 19 John. 384; *Holladay v. Marsh*, 3 Wend. 142; *Phillips v. Covell*, 79 Hun, 210; *Clark v. Brown*, 18 Wend. 213; *Rust v. Low*, 6 Mass. 90; *McDonnell v. Pittsfield & N. A. R. R. Co.*, 115 Mass. 564; *Buford v. Houtz*, 133 U. S. 320.)

The rule was not founded on any arbitrary regulation of the common law, but was an incident to the right of property. It is a part of that principle which allows every man the right to enjoy his property free from molestation or interference by others. It is simply the recognition of a natural right. It pertains to ownership. (*Bileu v. Paisley*, 18 Oregon, 47.)

There is an exception to the common law rule stated in favor of a person lawfully driving domestic animals along a highway. If such person exercise due care in so doing, he is not liable for injuries which they do by escaping from his control upon the adjoining lands if they are pursued and promptly removed. (*Rightmire v. Shepard*, 36 N. Y. S. R. 768.)

It is sometimes necessary to drive cattle along public high-

ways and such use of highways is lawful. As cattle will sometimes stray even if reasonable care is used in driving them, the possibility of damage by their inadvertent and casual straying upon the lands adjoining the highway, is one of the necessary consequences of the enjoyment of the right to use the highway. It must, therefore, have been contemplated when the highway was laid out and established. Such casual trespassing is an inevitable incident to the right to use the highway, and where the owner of lands adjoining a highway leaves the same wholly unfenced, he thereby adds to the possibility of such casual trespass. (*Goodwyn v. Cheveley*, 28 L. J. 298 [Eng.]; 47 Justice of the Peace [Eng.] 513, Aug. 18, 1883; Ingham on Animals, 284.)

The rules of the common law in regard to cattle trespassing upon the lands of others have been recognized, approved and adopted in this and many states of the Union. They are not adopted in some of the states of the Union for the reason that they were inapplicable to the nature and condition of the country at the time such rules were first considered by the courts of such states. The great value of the lands of such states for pasturage, and the scarcity of materials for fencing, were the principal reasons for their courts holding that the rules of the common law were inapplicable. (*Buford v. Houtz*, 133 U. S. 320.)

Fence laws have been adopted in this and other states which materially affect the question of the rights of parties when cattle trespass upon lands from other lands in which they are rightfully allowed to roam.

Where by statute or otherwise an obligation rests upon an owner of real property to fence the same, such obligation extends only in favor of persons owning domestic animals which are rightfully on adjoining lands. It is a principle of the common law universally recognized where the common law prevails that owners of real property are not obliged to fence but against cattle which are rightfully on the adjoining lands. (See cases and authorities cited above.) The statutes of this state are drawn in recognition of this rule.

The Railroad Law (Laws of 1890, chap. 565, sec. 32, as amended by chap. 676 of the Laws of 1892) provides that every railroad corporation shall erect and maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands. And it further provides that no railroad need be fenced when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands.

The duty to fence their tracks imposed upon railroad companies by statute is the same imposed upon individuals by prescription, at common law or by statute, and requires them to fence their tracks only against domestic animals rightfully on the adjoining lands or rightfully on the highway. (12 Am. & Eng. Ency. of Law [2d ed.] 1084; see, also, vol. 16, 494; *Lee v. Brooklyn Heights R. R. Co.*, 97 App. Div. 111.)

The fence law of this state provides: "Each owner of two adjoining tracts of land, except when they otherwise agree, shall make and maintain a just and equitable portion of the division fence between such lands, unless one of such shall choose to let his lands lie open to the use of all animals which may be lawfully upon the others lands, and does not permit any animals lawfully upon his premises to go upon lands so lying open. * * *." (The Town Law [Laws of 1890, chap. 569], sec. 100, as amended by Laws of 1892, chap. 92.)

It further provides: "When the owner of any lands shall choose to let them lie open, he shall serve upon the owners of the adjoining lands a written notice to that effect, and thereafter the owners of such adjoining lands shall not be liable in any action or proceedings, for any damages done by animals lawfully upon their premises going upon the lands so lying open or upon any other lands of the owner thereof through such lands so lying open. * * *." (The Town Law, sec. 101.)

The exclusive right of possession incident to the ownership of real property extends to all owners including the owners of real property adjoining a highway. Because it is neces-

sary at times to drive cattle along a highway, and they cannot be so driven without exposing the owners of real property adjoining the highway to an inevitable risk, such risk, as we have seen, is incident to the use of the highway and a burden upon such adjoining lands.

The exception to the common-law rule that prevents the owner of lands adjoining a highway from recovering damages for an inadvertent trespass of cattle from such highway, is only applicable in favor of owners of cattle lawfully upon the highway, and the reason for the exception to the rule does not apply where the cattle trespassing upon adjoining lands were unlawfully in the highway, neither does it extend to trespasses upon lands other than those adjoining the highway.

Cattle coming upon lands of an adjoining owner from a highway can be driven from such lands by the owner, and it is the duty of the owner of the cattle to remove them with all reasonable speed.

A recovery for an inadvertent trespass by cattle lawfully on the highway is not denied, because the cattle are lawfully upon the lands adjoining the highway, but the exception to the rule is, as we have also seen, an arbitrary and artificial one arising from necessity or an effort to relieve persons engaged in a lawful traffic on a public highway from too heavy a burden, and goes only to the extent of depriving such owner of lands adjoining the highway of a remedy by action for such trespasses. The cattle are not lawfully upon such adjoining lands, and if they trespass upon lands of another after crossing the lands so adjoining the highway, they do so from a place where they had no right to roam; and as an owner of lands, even where division fences are required by statute or prescription, is not required to fence against cattle not rightfully upon the adjoining lands, the plaintiff is not deprived of his remedy for the trespass of the defendant's cattle. The exception to the rule relating to the remedy for trespasses by cattle has never been extended, so far as we are aware, to prevent the recovery for a trespass by cattle wrongfully on a

highway, or wrongfully on lands adjoining those upon which damages are claimed for trespass. The plaintiff in this case, by leaving his lands unfenced, did not take the chances without the right of recovery for trespasses by cattle wrongfully upon the lands adjoining the highway and between the highway and his lands. The limitation on the exception to the rule of the common law relating to trespass upon real property has been stated by the courts so far as appears from the reports whenever the question has been squarely presented.

In 1604, in the case of *Harvy v. Gulson* (Hil. 1 Jac. C. B.), reported by William Noy (Eng.), in 1669, and found at page 107 of his volume of reports, the Hilary Term James I Common Pleas Court said: "That if A hath a Close next to the Highway and beasts come out of the Highway into the Close of A, and there—hence they enter into another Close of B adjoining and that B ought to fence, There in default of enclosure, etc., it is a good plea against A, but not against B or another stranger etc." VE: 36, H. 6 Barr 168.

In *Lord v. Wormwood* (29 Maine, 282), cattle were lawfully in the highway, they being permitted to go at large and feed there, by vote of the town; and being thus upon it, and having passed therefrom into the unfenced land of an adjoining proprietor, it was held that, although he might not be able to maintain any action, they were wrongfully upon such land, and having passed therefrom to and upon the plaintiff's unfenced lot not bordering upon the highway, he might maintain trespass, for he was under no obligation to fence as against them.

In *McDonnell v. Pittsfield & North Adams R. R. Corporation* (115 Mass. 564) the defendant was sued for the value of two colts run over and killed by one of its engines. The colts were on the highway in the care of the plaintiff's son, and escaped upon the lands of one Wells adjoining the highway, and from the lands of Wells entered upon the defendant's right of way and were there killed. The court say:

"The principle of the common law, which requires that

each should keep his cattle on his own land, is so far modified as to hold the owner not liable for the trespass of his cattle, which, passing along the highway and being properly managed therein, casually wander into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the cattle are not in such case lawfully upon such lots. They are there only under such circumstances that their trespass, being casual, and such as could not have been prevented by reasonable care, is held excusable, and this is all. That they should be rightfully and lawfully upon land, the authority or consent of the owner of the close is necessary, and even if he is without a remedy for the injury they may cause him, the owner of the cattle does not acquire his rights as against the owners of adjoining closes. If, after entering upon his close, they proceed into another adjoining thereto, they are there trespassers, and an action may be maintained for such trespass, by the owner of the second close, even if his fence was insufficient, and if he was also bound to fence as against the owner of the first close. Being thus bound he is only bound to fence against cattle rightfully on the first close. (*Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33.)"

It thus appears both upon principle and from precedent that the owners of the cattle were liable to the plaintiff for any damage which he has sustained.

From the record it could be found that the cattle were all upon the plaintiff's land and that they did equal damage to him, if so the defendant was liable for such part of the damage done by all the cattle, as the number of cattle owned by him bears to the whole number of cattle trespassing upon the plaintiff's land. (*Partenheimer v. Van Order*, 20 Barb. 479.)

The judgment in each court should be reversed, with costs in all the courts.

CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER and WILLARD BARTLETT, JJ., concur. GRAY, J., absent. HISCOCK, J., not sitting.

Judgment reversed.

CHARLES MACMULLEN, Respondent, v. CITY OF MIDDLETOWN,
Appellant.

1. MUNICIPAL CORPORATIONS — RIGHT OF ACTION AGAINST CITY FOR NEGLIGENCE IN CARE OF STREETS PURELY STATUTORY AND SUBJECT TO RESTRICTION AT THE PLEASURE OF THE LEGISLATURE The duty imposed upon a municipality of caring for its streets and sidewalks is not private or local, so that a liability for its breach is enforceable by a common-law action, as in the case of a private corporation, but is performed as a political agency, and is governmental. The liability may be created or not as the legislature may see fit; if created, its enforcement may be surrounded with any restrictions or conditions deemed necessary. The right to enforce it, therefore, is not a common-law right of which the owner cannot be deprived without due process of law, but is purely statutory and may be destroyed or restricted at the pleasure of the legislature.

2. CONSTITUTIONAL LAW — REQUIREMENT IN CHARTER AS TO WRITTEN NOTICE OF EXISTENCE OF SNOW OR ICE ON SIDEWALKS CONSTITUTIONAL. A provision in a municipal charter relieving the city from liability for injuries resulting from an accumulation of snow and ice on a sidewalk unless written notice of such accumulation is actually given to the common council, and there is a failure within a reasonable time to cause its removal, is constitutional and valid, is an essential part of a cause of action against the city for such injuries, and compliance with its requirement as to giving the written notice specified must be alleged and proved.

MacMullen v. City of Middletown, 112 App. Div. 81, reversed.

(Submitted November 12, 1906; decided January 8, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 22, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the questions certified are stated in the opinion.

Henry W. Wiggins and *Russell Wiggins* for appellant. A condition precedent to the maintenance of an action is a fact necessary to be proven and, therefore, necessary to be alleged

in the complaint, and unless so alleged the complaint is demurrable. (*Krall v. City of New York*, 44 App. Div. 259; *Reining v. City of Buffalo*, 102 N. Y. 308; *Thrall v. Cuba Village*, 88 App. Div. 410; *Welsbach Co. v. N. G. & El. Co.*, 96 App. Div. 52; 180 N. Y. 533; *Rosenstock v. City of New York*, 97 App. Div. 341; 181 N. Y. 550; *Jewell v. City of Ithaca*, 72 App. Div. 220.) The liability of the city herein is statutory and being such the legislature could impose such conditions as it saw fit. (Cooley on Torts, 662; *Barry v. Vil. of Port Jervis*, 64 App. Div. 272; *Hover v. Barkhoof*, 44 N. Y. 113; *Lane v. Town of Hancock*, 142 N. Y. 515; *Paterson v. City of Brooklyn*, 6 App. Div. 129; *Curry v. City of Buffalo*, 135 N. Y. 366; *Rider v. City of Mount Vernon*, 87 Hun, 29; *Williams v. Vil. of Port Chester*, 72 App. Div. 518; *Sehl v. City of Syracuse*, 81 App. Div. 548.) Assuming this to be a common-law action the legislature has power to attach a condition precedent to its maintenance, and the condition imposed by section 30 of defendant's charter is reasonable. (*Reining v. City of Buffalo*, 102 N. Y. 311; *McNally v. City of Cohoes*, 53 Hun, 204; *McManus v. City of Watertown*, 88 App. Div. 363; *Elias v. City of Rochester*, 49 App. Div. 597; *Turba v. City of Rochester*, 41 App. Div. 188; *Smith v. City of Rochester*, 46 N. Y. S. R. 727.)

Abram F. Servin and *Elbert N. Oakes* for respondent. The duty of a municipality to keep its streets in proper condition is one which it assumes when accepting the fact of its corporate existence. (*Conrad v. Vil. of Ithaca*, 16 N. Y. 158; *Missano v. Mayor*, 160 N. Y. 123; *Hardy v. City of Brooklyn*, 90 N. Y. 435; *Ehrgott v. Mayor*, 96 N. Y. 264; *Turner v. City of Newburgh*, 109 N. Y. 301; *Bieling v. City of Brooklyn*, 120 N. Y. 98.) For an injury caused by neglect of this duty a cause of action arises at common law irrespective of any statute. (*Conrad v. Vil. of Ithaca*, 16 N. Y. 158.) This right of action is property within the meaning of the Constitution. (*Gilbert v. Ackerman*, 159 N. Y.

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118; *Dyett v. Hyman*, 129 N. Y. 351.) The statute in question clearly takes away this property right, and is, therefore, unconstitutional and void. (*Williams v. Vil. of Port Chester*, 72 App. Div. 505.)

GRAY, J. The plaintiff, a resident of the city of Middletown, in this state, sustained personal injuries from a fall upon a sidewalk of the city, at a point where snow and ice had accumulated. He, thereafter, commenced this action to recover damages against the city. He alleges, in his complaint, that the defendant had neglected to remove the snow and ice from the sidewalk, though it had knowledge, or notice, of its dangerous condition for some time prior to the accident. The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The legal question, presented by the demurrer, arises out of one of the provisions of the defendant's charter. (Chapter 572 of the Laws of 1902.) The charter imposes upon the common council, as commissioners of highways for the city, the duty of keeping the streets in good order and of requiring owners, or occupants, of abutting properties to clean the snow and ice from the sidewalks. The office of superintendent of streets was created, whose incumbent should superintend the work to be done upon the public streets. (Secs. 68 & 107.) Section 30 of the charter contains the provision under consideration and reads that no civil action "shall be maintained for damages or injuries to the person sustained in consequence of the existence of snow or ice upon any sidewalk, crosswalk or street, unless written notice thereof relating to the particular place, was actually given to the Common Council and there was a failure or neglect to cause such snow or ice to be removed, or the place otherwise made reasonably safe within a reasonable time after the receipt of such notice." It is not alleged in the complaint that this written notice had been given and, as such a notice was made a condition precedent to the maintenance of such an action, the absence of such an allegation would be fatal to the complaint upon

demurrer; unless the provision of the statute was invalid, because violating some constitutional right of the plaintiff. The courts below have overruled the demurrer and the Appellate Division, in the second judicial department, has certified to this court for our review the questions of law, whether the complaint states facts sufficient to constitute a cause of action and whether the provision contained in section 30 of the charter, above referred to, is constitutional.

As to the first question, it suffices to say that, if the provision of the charter was a valid enactment, it was an essential part of the plaintiff's cause of action and compliance with its requirement, as to giving the written notice specified, must be alleged and proved. (*Reining v. City of Buffalo*, 102 N. Y., 308.)

The opinion of the Appellate Division concedes that there can be no evasion of this provision of the charter, but reaches the conclusion that the enactment exceeded the powers of the legislature and is, therefore, unconstitutional. In that view I am unable to agree with the learned justices below and I think that it was somewhat influenced by a misapprehension of the effect of the decisions upon the subject of the duties and liabilities of our municipal corporations. The opinion below discusses the distinction which exists between those duties, which may be imposed upon the municipality for its private, or local, interests, and those which may be imposed upon its officers for the benefit of the public, generally. In the one case, it is reasoned, there exist a duty and a consequent liability for its breach, as in the case of a private corporation; while, in the other case, the duty is performed as a political agency and is governmental. As, therefore, the duty of caring for its streets is imposed upon the municipality for its own benefit, it is to be regarded as a private company, whose breach of duty in that respect would entail upon it a liability enforceable by "a common law action and in no sense * * * statutory." It was admitted that, if the liability was statutory, the legislature could impose any conditions; but, not being such in its nature, the provision that a

written notice must have been actually given, before an action could be maintained, was equivalent to the denial of any remedy for the wrong. It was, in effect, held that there was a right growing out of the breach of the duty owing from the defendant to the plaintiff, which was within the protection of the constitutional guarantees.

In my view of this question, the legislature in no wise exceeded its just powers by the enactment of the provision in this charter; however restrictive the requirement. A municipal corporation is a political, or governmental, agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good. In its organization and in the assignment of its powers and duties, the legislature acts supremely. The power to grant, or to deny, a remedy by private action for the breach of a duty, imposed upon it for governmental purposes, and to affix conditions, where the right to an action is given, is not one which should be called in question. It may be that such a question, upon precisely these facts, may not have been presented to this court in previous cases. The cases are numerous, which involved the right of a municipality to defeat the claims of a plaintiff, because of the failure to show notice, or knowledge, on its part of the conditions complained of and because of the failure to comply with statutory requirements of notice to municipal officers, before the commencement of an action. The novelty of the case, in the feature of the statutory requirement that a written notice shall have been given, is explained in the legislative purpose to make that certain, which before was, often, uncertain. The fact of knowledge should no longer be dependent upon inferences from the evidence of circumstances; nor the liability of the municipality be left to a determination reached upon an indulgent construction of the legal rule as to actual notice.

In the case of *Curry v. City of Buffalo*, (135 N. Y. 366), where the plaintiff, who had been injured by a fall upon a defective sidewalk, had failed to recover her damages, by

reason of the omission to file, pursuant to the statutory provision, a notice of her intention to commence an action and of the time and place at which the injuries were received, we did say, quite explicitly, that "the whole matter of the maintenance of this class of actions was within the control of the Legislature. It could refuse a right of action against municipalities for such injuries and it could impose any conditions precedent to the maintenance of such actions."

This statement of the rule was deliberate and, in my opinion, it is correct, when the nature and functions of municipal corporations are considered. It was quoted with approval by the Appellate Division in *Rider v. City of Mt. Vernon*, (87 Hun, 29), in *Patterson v. City of Brooklyn*, (6 App. Div. 129), and in *Thrall v. Cuba Village*, (88 ib. 413).

These corporations are bodies politic; created by laws of the state for the purpose of administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the legislature, and they are subjected to certain duties. They are the auxiliaries, or the convenient instrumentalities, of the general government of the state for the purpose of municipal rule. The consideration of the grant of a charter is the benefit to the public and their relation to the state is not contractual, in the constitutional sense; for there is no element of reciprocity and the corporate duties are incompatible with the notion of a compact. The whole interests are the exclusive domain of the government itself and the power of the legislature over them is supreme and transcendent; except as restricted by the Constitution of the state. Their charters being granted for the better government of the particular districts, the right to insert such provisions as seem to best subserve the public interest would seem, from the very nature of such institutions, to be inherent. (*People ex rel. Wood v. Draper*, 15 N. Y. 532, 544; *People v. Tweed*, 63 ib. 207; *Meriwether v. Garrett*, 102 U. S. 472, 511; *Dartmouth College v. Woodward*, 4 Wheat. 578; *Cooley's Constit'l Lim.* *pp. 191-3; *Dillon on Munic. Corp's*, secs. 9, 30; *Ang. & Ames on Corps.* sec. 31.) These

principles are familiar from their frequent statement in the books and their brief summary here is to emphasize the idea that a municipal corporation is but a part of the machinery of government; that it is the creation of the legislature, which endows it with certain local governmental functions and imposes upon it the performance of certain duties, and that its every feature is subject to the regulation of the legislature in granting the charter and to the right of that body to change, or to modify, as the public interest may demand. It exists for the benefit of the public and of the incorporated community, and but incidentally for that of the individual. In the exercise of powers and in the performance of duties, which are affected by a public interest, it acts for the state and it is for the legislature to prescribe whether, and how far, for the breach of a public duty, the individual may maintain a civil action to remedy an injury occasioned thereby. It is difficult to perceive the basis for any claim to an absolute right to the preservation of a remedy against this municipal adjunct of the state sovereignty. The charter is not a contract with the individual and I am not aware of any limitations upon the power of the state, outside of the Constitution, to adjust every governmental relation with the citizen, as it may seem discreet and best for the general welfare.

In *People ex rel. Wood v. Draper*, (*supra*), Chief Judge DENIO observed that, independently of the restraints to be found in the constitutional provisions for civil government, "every subject within the scope of civil government is liable to be dealt with by the Legislature. As it may act upon the State at large, by laws affecting at once the whole country and all the People, so it may in its discretion, and independently of any prohibition, expressly made, or necessarily implied, make special laws relating to any separate district, or section of the State. * * * The representatives of the whole People, convened in the Legislature, are * * * the organs of the public will in every district or locality of the State." In *People v. Tweed*, (*supra*), it was said by Chief Judge CHURCH that the legislature of this state possesses "full power, except as

restricted in the Constitution, to control by direct legislation the local affairs of a public nature of any of the civil divisions of the State." In *Meriwether v. Garrett*, (*supra*), Mr. Justice FIELD, speaking of municipal corporations, said that "there is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons, who deal with such bodies, are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them." Judge Cooley, in his work on Constitutional Limitations, states that "the municipalities must look to the State for such charters of government and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. * * * The creation of municipal corporations and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the Legislature of the State of that general control over their citizens, which was before possessed. * * * Restraints on the legislative power of control must be found in the Constitution of the State, or they must rest alone in the legislative discretion."

It seems very clear to me that, in the distribution, through charters, to municipalities of governmental powers and of administrative duties within the described territory, there is no limitation upon the regulative power of the legislature. For the breach of a duty, imposed for the public benefit, it may grant, or deny, a remedy to an individual, who has sustained damage, and in granting a remedy impose conditions upon the right to enforce it. It seems to me that a thoughtful consideration of the nature of these public corporations and of the principles, which underlie their creation, leads, irresistibly, to the just conclusion that they can only be subjected to liabilities to the extent and in the manner that the charter permits, expressly, or impliedly. In the case of those *quasi* municipal corporations, constituting political divisions of the

state for convenience of government and which existed without special charters, the common law gave no right of action, in such a case as this. It is by force of the special, or statutory, charter, that municipal corporations come under a liability for a breach, or neglect, of corporate duties imposed, which is enforceable by every individual interested in their performance. (See Cooley's *Constit'l Limitations*, *pp. 240, 247, 248.)

The charter of the defendant made the common council commissioners of highways for the city. They were charged with the duty of keeping the streets in proper condition and were empowered to require the owners and occupants of buildings, or lots, to clean the snow and ice from the sidewalks. That these provisions of the charter would make the municipality responsible for the acts of its officials, as corporate agents, in the absence of any restrictive clause, may be regarded as having been settled by the decision of this court in the case of *Conrad v. Trustees of Village of Ithaca*, (16 N. Y. 158); the authority of which has been repeatedly recognized since. (*Ehrgott v. Mayor, etc., of N. Y.* 96 N. Y. 265; *Ryan v. City of New York*, 177 N. Y. 271, 288.) The doctrine of municipal liability, thus settled, rested upon the proposition that the municipal corporation, for a consideration received from the sovereign power, has agreed, expressly or impliedly, to do certain things and its neglect to do them exposes it to public prosecution, or to a private action by any person injured thereby. But this doctrine, or rule, of responsibility furnishes no satisfactory reason why the legislature, which creates this public corporation, may not, validly, in the exercise of its conceded general powers of control, deny to the individual the right to maintain a private action against it, or restrict the right by any regulation, which it deems proper. The same judge, who spoke so emphatically for the court in *Curry v. City of Buffalo*, (*supra*), delivered the earlier opinion in *Ehrgott v. Mayor, etc., of N. Y.*, (*supra*); a case where the municipal liability to a civil action had been asserted upon the authority of *Conrad v. Trustees of Village of Ithaca*. Where

the charter of a municipal corporation is silent upon the subject, the legislature may be regarded as having left its liability to depend upon the general rule that, if the power conferred relates to the accomplishment of corporate purposes, for the corporate benefit, the corporation is as a private company and there attaches the same responsibility as there would to a legal individual, if possessing like powers and franchises. But where the charter voices the will of the legislature, upon the subject of the responsibility of the political agency of the state to answer to the complaint of a private individual, it announces a rule of conduct, which is to govern the relations of the municipality with its citizens. No right is thereby taken away; but relative rights are defined, which are to be binding upon those who choose to remain residents of the municipality. Legislative restriction, or regulation, is especially justifiable where the provision has relation to the performance of duties, which, as in this case, though for the corporate benefit, are, also, of public interest. The power of control over streets and highways was delegated by the legislature to the common council of the city, as its representative, in the interest of a better governmental policy. It might have reserved the performance of a duty so important to the general public to an independent body, as a convenient way of exercising the governmental functions. If, in investing the municipality with the duty, the legislature should regard its performance as partaking of a governmental nature and should relieve it of responsibility for breaches, could it properly be said to have violated any constitutional rights of the citizens? I think not and if the view of the learned court below is right, that the provision in this charter was equivalent to a denial of any remedy for an injury sustained through a failure of the defendant to keep its streets in good order, then I hold that its enactment was a valid exercise of legislative power.

Whether the provision in question be termed a restriction upon a common law right to sue the corporation; or whether it be termed an imperative rule of the charter with respect to

the maintenance of actions, is not material. The state created the defendant as a political agency of government and the adjustment of its powers and duties, and of the relative rights of citizens and municipality, was the province of the legislature. The charter created a liability for a neglect of the duty to remove snow and ice from the streets and sidewalks and gave a remedy by action. If its requirement that a written notice shall have been given to the common council, as a condition precedent to the maintenance of an action, be regarded as harsh, correction is not to be sought from the courts. The requirement is the expression of the legislative will that the notice of the defective condition of the public way, which has occasioned the injury sustained, shall be of so certain a character as to charge the corporation with actual knowledge. It was always the legal rule that notice should be brought home to the corporation, or facts from which notice was reasonably inferable. In order that something more certain than constructive notice should be relied upon, provisions were inserted in municipal charters that "actual notice" of the alleged defect must be shown. But even actual notice might be proved by circumstances of a convincing character, (*McNally v. City of Cohoes*, 127 N. Y. 350), and the purpose of the legislature becomes evident, in the insertion of such a provision as we find in the defendant's charter. Notice to the city was no longer to be established upon inferences from facts and circumstances. Its liability for a neglect to keep its streets free from dangerous accumulations of snow and ice should only be enforceable, where full notice had been given to it in writing. Incidentally, the provision accomplishes a useful purpose, in charging the citizens with a duty of giving prompt notice of any such defective and dangerous conditions. A somewhat similar provision in the Public Statutes of Rhode Island, with respect to the necessity of a notice in writing of a highway obstruction having been given, in order to hold towns liable for a personal injury, was approved in *Allen v. Cook* (21 R. I. 525).

I reach the conclusion that the legislature had power to

provide that the liability of the defendant, in an action by a person complaining of an injury caused by a breach of the duty to remove snow and ice from the sidewalk, should be conditional upon the notice in writing having been given and that the provision violated none of the plaintiff's constitutional rights.

It follows that the first of the questions certified should be answered in the negative and the second question in the affirmative.

I advise, therefore, that the order and judgment appealed from should be reversed and that the defendant have judgment sustaining its demurrer to the complaint, with costs in all the courts; with leave, however, to the plaintiff to amend his complaint within twenty days from notice of the entry of the order, upon payment of the costs.

CULLEN Ch. J., HAIGHT, VANN, WERNER and HISCOCK JJ., concur; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. THE
BROOKLYN HEIGHTS RAILROAD COMPANY, Respondent.

1. RAILROADS—PROVISIONS OF RAILROAD LAW (ART. 4, § 101) WITH RESPECT TO FIVE-CENT FARE ON STREET SURFACE RAILROADS, NOT APPLICABLE WHERE LINES LEASED ARE STEAM SURFACE OR ELEVATED ROADS. Section 101 of article 4 of the Railroad Law (L. 1890, ch. 565, as amd.), requiring a street surface railroad to carry a passenger over its own line and any line leased by it within the limits of any incorporated city or village for a single fare, applies solely to street surface railroads; it does not apply where the line leased is an elevated or steam surface road having a charter right to charge a greater fare. A street surface railroad may lease another street surface railroad or a steam surface railroad or an elevated railroad (Art. 3, § 78); if it does, it must operate the leased line in accordance with the requirements of the charter thereof and is entitled to the benefits conferred thereby, including the authorized rate of fare.

2. CHANGE OF MOTIVE POWER ON LEASED LINES DOES NOT AFFECT RATE OF FARE. The fact that the lessee subsequently dispensed with steam as a motive power and substituted electricity on the leased lines

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Statement of case.

does not affect the situation or change its rights so far as the question of fares is concerned.

3. RATE OF FARE A QUESTION FOR LEGISLATIVE DETERMINATION. Whether the elevated and steam surface railroads within a city should be placed upon the same basis with street surface railroads with reference to fares and the transfer of passengers is a question for the determination of the legislature and not for the courts.

Not reported below.

(Argued December 3, 1906; decided January 8, 1907.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 2, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the answer.

The nature of the action and the facts, so far as material, are stated in the opinion. The following questions were certified: "1. Does the plaintiff's complaint state facts sufficient to constitute a cause of action?"

"2. If the complaint states facts sufficient to constitute a cause of action, is the first defense of the defendant's answer sufficient in law upon the face thereof?"

"3. If the complaint states facts sufficient to constitute a cause of action, and the first defense of the defendant's answer is insufficient in law upon the face thereof, is the second defense of the defendant's answer sufficient in law upon the face thereof?"

Julius M. Mayer, Attorney-General (Stephen C. Baldwin and Frederick S. Martyn of counsel), for appellant. The first question certified should be answered in the affirmative. (*People v. B., F. & C. I. Co.*, 89 N. Y. 75; *People v. E. G. L. Co.*, 141 N. Y. 232.) The defendant is lawfully entitled to charge but a single fare of five cents for the transportation of each passenger over the routes mentioned in the complaint. (*Dartmouth College v. Woodward*, 4 Wheat. 518; *O. R. & N. Co. v. Oregon Ry. Co.*, 131 U. S. 1; *B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 524; *People ex rel. T. A.*

R. R. Co. v. Newton, 112 N. Y. 396; *Langdon v. Mayor, etc.*, 93 N. Y. 128; *U. S. v. Arredondo*, 6 Pet. 736; *C. R. Bridge v. Warren Bridge*, 11 Pet. 420; *Matter of McGraw*, 111 N. Y. 66; *McNulty v. B. H. R. R. Co.*, 31 Misc. Rep. 674; *Barnett v. B. H. R. R. Co.*, 53 App. Div. 432.)

Edward W. Hatch and *Charles A. Collin* for respondent. Sections 101 and 104 of the Railroad Law are in article 4, which is entitled "Street Surface Railroads" and which is limited, strictly, to the subject expressed in the title. There is nothing in article 4 authorizing or regulating the construction, maintenance or operation of steam railroads or elevated railroads. There is not, and never has been any provision in article 4 authorizing a street surface railroad corporation to operate a steam railroad or an elevated railroad, or regulating the operation of a steam railroad or of an elevated railroad by a street surface railroad corporation. (*Matter of B., Q. C. & S. R. R. Co.*, 185 N. Y. 171; *Barnett v. B. H. R. R. Co.*, 53 App. Div. 436.) Construing the general language in the first two sentences of section 101 of article 4 of the Railroad Law with reference to the repeated judicial utterances that article 4 relates to street surface railroads only; with reference also to the express limitations to the same effect, in the title and first sentence of that article; with reference also to the express limitations to the same effect in nearly every other section of the article, and with reference to the other language in section 101 itself and to the whole internal structure of that section, the conclusion is irresistible and clear that the general language in section 101 "any road" means "any street surface railroad." But even if the general language of the first two sentences of section 101 should be deemed applicable to all kinds of railroads, nevertheless, by the express exception contained in the third sentence, the first two sentences are not applicable to the four miles and more of the steam railroad portion of each route which were constructed prior to May 6, 1884, and were then in operation; and, therefore, section 101 does not prohibit the defendant from charging ten cents to each passenger

who is carried three miles and more over such excepted steam railroad portion on each route. (*Barnett v. B. H. R. R. Co.*, 53 App. Div. 432; *B. El. R. R. Co. v. B. & W. E. R. R. Co.*, 23 App. Div. 29; *McNulty v. B. H. R. R. Co.*, 31 Misc. Rep. 67; *McNulty v. B. H. R. R. Co.*, 36 Misc. Rep. 402; *Matter of McFarlane*, N. Y. L. J. Aug. 14, 1906.) Section 104 of the Railroad Law is applicable only to contracts between street surface railroad corporations for the operation of street surface railroads. (*Griffin v. I. S. Ry. Co.*, 179 N. Y. 443.) Even if it should be held that section 104 is applicable to steam railroads and elevated railroads, nevertheless we still insist that it authorizes the defendant to charge the rate of fare which it has charged, by virtue of the words "one single fare not higher than the fare lawfully chargeable by either of such corporations for an adult passenger." (*Jackson v. H. R. R. Co.*, 49 N. Y. 455; *Matter of Village of Middletown*, 82 N. Y. 196; *People v. Fitch*, 148 N. Y. 71; *Minor v. E. R. R. Co.*, 171 N. Y. 566; *Parker v. E. C. & N. R. R. Co.*, 165 N. Y. 274.) Sections 101 and 104 of article 4 of the Railroad Law, so far as they prescribe the rate of fare for a continuous ride or trip, apply only to street surface railroads constructed within the limits of one incorporated city or village, and, therefore, the railroads in question are excluded from the operation of either section. (*People ex rel. S. G. L. Co. v. Gilroy*, 67 Hun, 323; 139 N. Y. 623; *Cameron v. N. Y. & M. V. W. Co.*, 133 N. Y. 336; *Christie v. Borne*, 83 Hun, 107; *County of Jefferson v. City of Watertown*, 98 App. Div. 494; *Johnson Home v. Vil. of Seneca Falls*, 37 App. Div. 147; *Matter of East One Hundred & Sixty-ninth St.*, 26 Misc. Rep. 257; *Matter of East One Hundred & Fifteenth St.*, 29 Misc. Rep. 487; *People v. Fitzgerald*, 180 N. Y. 269.)

HAIGHT, J. This action was brought to restrain the defendant from collecting more than one fare of five cents for a continuous ride over certain railroads operated by it within the city of New York. It appears from the allegations of

the complaint that the defendant was incorporated as a street surface railroad in 1887, under and pursuant to chapter 252 of the Laws of 1884, and that it constructed and continues to own and operate a street surface railroad the entire length of Montague street in the city of Brooklyn; that under and pursuant to various leases and contracts it has acquired the right to and is operating a railroad over four different routes, viz.: The Sea Beach and Culver routes, commencing at the Manhattan terminal of the New York and Brooklyn bridge; thence over the bridge to the Brooklyn terminal thereof; thence over certain elevated railroads to Fifth avenue and Thirty-seventh street; thence over certain steam surface railroads to Coney Island, and *vice versa*, a distance of 11.36 miles. The Brighton Beach route, commencing at the Manhattan terminal of the New York and Brooklyn bridge; thence over the bridge to the Brooklyn terminal; thence over an elevated road to Fulton street and Franklin avenue; thence over certain steam surface railroads to Coney Island, and *vice versa*, a total length of 12.03 miles. The Cypress Hill route, commencing at Cypress Hill Cemetery; thence over an elevated railroad to Fulton street and Franklin avenue; thence over certain steam surface railroads to Coney Island, and *vice versa*, a total length of 13.34 miles. It further appears that all of the railroads so operated by it upon the routes mentioned are elevated railroads incorporated as such, or steam surface railroads operating upon a private right of way procured and owned by the company; that all the steam surface railroads within the routes mentioned were constructed and in operation prior to May 6th, 1886, and had the right to charge under their charter three cents per mile; that all of the elevated roads, included in the routes mentioned, were operated by steam locomotive engines and were authorized to charge as fare ten cents, except during certain hours, specifically mentioned, during which it was permitted to charge but five cents. After the defendant commenced the operation of these roads, electricity was substituted in place of steam, and they are now operated by that motive power.

Over the elevated roads it charges a fare of five cents, and over the steam surface roads, so called, it charges an additional fare of five cents.

The towns of New Utrecht, Gravesend, Flatbush and New Lots, which include the territory lying between the city of Brooklyn as it previously existed and the sea, were annexed to and became a part of the city in the years 1894 and 1896, and in 1898 the city of Brooklyn was consolidated with the city of New York.

The question presented for our determination is as to whether the defendant has the right to charge two fares of five cents each in transporting passengers over any of the routes mentioned, one fare of five cents over the elevated roads and another fare of five cents over the steam surface roads between the Brooklyn bridge and Coney Island and between Cypress Hill and Coney Island, or whether it is limited to a charge of one fare of five cents.

Chapter 565 of the Laws of 1890, as amended from time to time, known as the "Railroad Law," was designed to afford a complete system for the organization of railroad corporations, and for the construction and operation of railroads within this state. It consists of six articles.

The first contains general provisions with reference to the organization, powers, and location of all kinds of railroads, but it contains some sections which are limited to a particular kind of railroad. The second pertains to the construction, operation and management of railroads. Some of the sections of this article are general, applicable to all railroads, but some of the provisions pertain only to steam surface railroads. The third contains provisions authorizing the consolidation and reorganization of companies and the lease or sale of railroads, and is general, applying to all kinds of railroads. The fourth pertains exclusively to street surface railroads. The fifth pertains to other railroads in cities and counties which may be over, upon or under the surface of streets, thus including elevated and subway railroads. The sixth establishes a board of railroad commissioners, and pertains to their

duties. Under article three, section 78, which applies to all railroads organized under general laws, the legislature has provided that "Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state, may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract." It was under this provision of the statute that the defendant acquired its right to operate the elevated and steam surface railroads, constituting the four different routes referred to, from the Brooklyn bridge and from Cypress Hill to Coney Island. Article four, as we have seen, is entitled "Street Surface Railroads," and pertains exclusively to the location in streets, the construction and operation, and the rate of fare that may be charged for the transportation of passengers. Section 101 provides that "No corporation constructing and operating a railroad under the provisions of *this* article, or of chapter 252 of the Laws of 1884, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged, within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article. * * * This section shall not apply to any part of any road constructed prior to May 6th, 1884, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this

article." Chapter 252 of the Laws of 1884, above alluded to, was passed May 6th of that year, and pertains to street surface railroads. Section 104 requires every such corporation, upon demand and without extra charge, to give to each passenger paying a single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad operated by it, to the end that public convenience may be promoted, and in case of a violation of its duty in this regard a penalty of fifty dollars is provided for each offense, recoverable by the aggrieved party. Under these provisions of the statute we have held that where one street surface railroad corporation acquires by lease or otherwise the right to operate another street surface railroad after the passage of the act, it must carry a passenger not only over its own road, but over the connecting leased roads operated by it within the limits of a city or village for a single fare; and that upon the intersection of such leased roads it must also upon demand furnish a transfer entitling the passenger to continue his trip over such connecting road operated by it. (*Griffin v. Interurban Street R. Co.*, 179 N. Y. 438; *O'Reilly v. Brooklyn Heights R. R. Co.*, 179 N. Y. 450.) The legislature has seen fit to limit the power of street surface railroads to consolidate, lease, contract or operate other street surface railroads by imposing a condition that in case they do so contract they shall transport over their connecting lines passengers for a single fare of five cents and furnish transfers to their own intersecting lines. But this, as we have seen, is limited to street surface railroads. The provisions of section 101, above referred to, are very specific in this particular; "no corporation constructing and operating a railroad under the provisions of this article, or chapter 252 of the Laws of 1884, shall charge," etc. As we have seen, "this article" is article four of the Railroad Law. It pertains exclusively to street surface railroads, and chapter 252 of the Laws of 1884, which was passed May 6th of that year, from which this section, as amended and revised, was taken, also pertains exclusively to street surface railroads. The words "this article" and

"such chapter" are twice repeated in the provisions of this section, thus emphasizing the legislative intent to limit its provisions to that particular kind of railroads. That such was the legislative intent is further apparent from the fact that no such provision or limitation is to be found in any of the general provisions of the Railroad Law as applicable to steam surface railroads or elevated railroads. It is true that the defendant was incorporated as a street surface railroad, that it has constructed, owns and operates a street surface road within the city of Brooklyn, and in case it leases or operates any other street surface railroad within that city it must furnish transportation over such leased connecting road for one fare; but such is not the case we have under consideration. The roads which it has leased and is operating which are involved in this case are not street surface railroads, but are elevated and steam surface roads.

The contention on the part of the state is, that the defendant's powers were limited to the operation of street surface roads, and that when it undertook to lease and operate elevated and steam surface roads they were brought within the provisions of sections 101 and 104, and that those sections should be construed as applicable thereto. We are of the opinion that this contention cannot be adopted. While the defendant was organized as a street surface railroad and was incorporated as stated, the General Railroad Law has authorized and empowered it to lease the elevated and steam surface railroads in question, by section seventy-eight of article three. The provision of that section, as we have seen, is that "*any* railroad corporation," etc. As we understand this phrase, it refers to *every* railroad incorporated under the provisions of the act. Such corporation "may contract with *any* other such corporation." No limitation is apparent. A steam railroad corporation can lease another steam surface railroad, a street surface railroad or an elevated railroad. So with a street surface railroad. It may lease another street surface railroad or a steam surface railroad or an elevated road; but when one railroad corporation undertakes to lease

and operate another road, it assumes all the duties, obligations and requirements imposed by the statute and the charter of such railroad. Such duties and obligations in the operation of steam surface railroads are in many respects different from those imposed in the operation of street surface roads, and in the operation of elevated roads there are still other obligations assumed which are materially different. We think it apparent, therefore, that when the legislature authorized the defendant to lease and operate the elevated and steam surface roads in question, it not only became empowered and authorized, but it was also its duty to operate such roads in accordance with the requirements of their respective charters. Having had cast upon it the duty and obligation to operate such roads in accordance with the requirements of their charters and the statute applicable thereto, as such lessee it became entitled to all of the privileges and benefits authorized by their charter and the statute, unless such roads are brought within the meaning of the sections referred to in article four, in which the defendant is limited to the charge of but one fare. We think that they are not. As we construe those sections they have reference to street surface railroads and no others. A corporation operating a street surface railroad is prohibited from charging more than one fare "for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village, * * * if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article." This provision has reference to street surface railroads, railroads which were constructed under the provisions "of such chapter or of this article," distinctly referring to those roads which were constructed under the provisions of the statute pertaining to street surface railroads. Nor do we think that the defendant, in dispensing with steam as a motive power and substituting electricity, affected the situation or changed its right so far as the ques-

tion of fares is concerned. Such change has been authorized under general laws, and by complying with the requirements of the statute with reference thereto it may be lawfully made.

The reasons that control the legislative mind in adopting this statute may not be important. It is quite possible however, that the fact that the cost of the construction of elevated railroads being many times greater than that of street surface railroads, was one of the reasons why it did not see fit to place them upon the same footing as to fares. Whether the elevated and steam surface railroads within a city should be placed upon the same basis with street surface railroads with reference to fares and the transfer of passengers, is a question for the determination of the legislature and not for the courts.

We consequently conclude that the complaint fails to state a cause of action, and that the judgment should be affirmed, with costs, and the first question certified answered in the negative. Others not answered.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE WEST SIDE ELECTRIC COMPANY, Appellant, v. CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Respondent.

THE WEST SIDE ELECTRIC COMPANY, Appellant, v. CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Respondent.

1. NEW YORK CITY—POWER TO GRANT FRANCHISE FOR ELECTRIC LIGHTING VESTED IN BOARD OF ALDERMEN, NOT BOARD OF ELECTRICAL CONTROL, ON OCTOBER 30, 1896. The power to grant to a corporation organized under the Transportation Corporations Law (L. 1890, ch. 566, § 61, embodying chapter 37 of the Laws of 1848 and chapter 512 of the Laws of 1879), a franchise to lay and construct suitable wires or other conductors in subways under streets, avenues, public parks and places in the city of New York for conducting and distributing electricity, was

vested in the "municipal authorities," and on October 30, 1896, those authorities were the board of aldermen and not the board of electrical control, established by chapter 716 of the Laws of 1887, and conferring upon such board certain powers with respect to the occupation of the streets for electric lighting; that act neither expressly nor by implication conferred the power to grant such franchise; the purpose of the act was to regulate the exercise of rights after they had been acquired, not to create them; the power to create them was left precisely where it was before, in the "municipal authorities," i. e., the board of aldermen.

2. STATUTES — PRACTICAL CONSTRUCTION. The doctrine of practical construction has no application to statutes free from ambiguity or not subject to any reasonable doubt as to their meaning.

People ex rel. West Side El. Co. v. Consolidated Tel. & El. Subway Co., 110 App. Div. 171, affirmed.

West Side El. Co. v. Consolidated Tel. & El. Subway Co., 110 App. Div. 171, affirmed.

(Argued November 26, 1906; decided January 8, 1907.)

APPEAL in the first above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 3, 1906, which affirmed an order of Special Term quashing an alternative writ of mandamus and dismissing the proceeding.

Appeal in the second above-entitled action from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 24, 1906, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The first case was a special proceeding in which the relator prayed for a writ of mandamus commanding the respondent to permit the relator to place in its electric subway in the city of New York two cables for electric lighting purposes and to open certain manholes and service boxes for that purpose.

The second case was a suit in equity in which the plaintiff sought to enjoin the defendant from interfering with or obstructing the plaintiff in the maintenance and operation of its cables and electrical conductors in the aforesaid subway and from interfering with the peaceable possession and enjoyment thereof by the plaintiff.

The cases were tried together at Special Term upon the same evidence and were both decided in favor of the defendant.

The other facts, so far as material, are stated in the opinion.

William D. Gathrie and *F. Kingsbury Curtis* for appellant. Chapter 716 of the Laws of 1887 transferred from the common council to the new board of electrical control the power to consent that duly incorporated electric light companies might "lay, erect and construct" electrical conductors in the streets of the city of New York; unmistakably expressed, it must be given effect. (*Anglo-Am. Prov. Co. v. Davis Prov. Co.*, 169 N. Y. 506; *People ex rel. Bockes v. Wemple*, 115 N. Y. 302; *Tompkins v. Hunter*, 149 N. Y. 117; *McCluskey v. Cromwell*, 11 N. Y. 593; *Schnaier v. N. H. & I. Co.*, 182 N. Y. 83; *Alfson v. Bush Co.*, 182 N. Y. 399; *Coal Co. v. Donley*, 73 Ohio St. 298.) The exercise of the power to consent that a duly authorized electric lighting corporation may lay, erect and construct electric wires or conductors in the streets of a city is not a legislative function, but is essentially administrative or executive. (*Beekman v. T. A. R. R. Co.*, 153 N. Y. 144; *Potter v. Collis*, 156 N. Y. 16; *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327; *People v. Sturtevant*, 9 N. Y. 263; *Milhau v. Sharp*, 27 N. Y. 611; *People ex rel. Murphy v. Kelly*, 76 N. Y. 475; *People v. U. & D. R. Co.*, 128 N. Y. 240; *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343; *Attorney-General v. Common Council of Detroit*, 29 Mich. 108; *City of Philadelphia v. L., etc., Ry. Co.*, 4 Brewst. 14.)

Alton B. Parker, *Samuel A. Beardsley* and *Henry J. Hemmens* for respondent. The power to give the consent required by the Transportation Corporations Law was vested in the board of aldermen in October, 1896. (*Ghee v. N. U. Gas Co.*, 158 N. Y. 510; *People ex rel. W. G. Co. v. Deehan*, 153 N. Y. 528.) The power to give the consent required by the Transportation Corporations Law was not taken from the

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board of aldermen and vested in the board of electrical control by section 1 of the act of 1887. (*Maxmilian v. Mayor*, 62 N. Y. 160; *O'Brien v. Mayor, etc.*, 65 Hun, 112; 139 N. Y. 543; *People ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 593; 145 U. S. 175.) Chapter 716 of the Laws of 1887 is a police regulation and conferred only administrative or ministerial powers on the board of electrical control. (*Ghee v. N. U. Gas Co.*, 158 N. Y. 510; *Gallagher v. Keating*, 40 App. Div. 85; *U. S. Ill. Co. v. Grant*, 55 Hun, 222; *Armstrong v. Grant*, 56 Hun, 226; *People ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 593; *A. R. T. Co. v. Hess*, 125 N. Y. 641; *W. U. T. Co. v. Mayor, etc.*, 2 Am. El. Cas. 195.) The Subway Act of 1887 did not withdraw the power from the board of aldermen to grant consents to the vesting of electric franchises and transfer them to other "municipal authorities," to wit, the board of electrical control. The power to grant franchises to electric companies in 1896 was vested in the board of aldermen. (*S. W. W. Co. v. Vil. of Skaneateles*, 161 N. Y. 165; *Beekman v. T. A. R. R. Co.*, 153 N. Y. 144; *People ex rel. W. Gas Co. v. Deehan*, 153 N. Y. 528; *People v. O'Brien*, 111 N. Y. 32; *Suburban R. T. Co. v. Mayor, etc.*, 128 N. Y. 510; *Matter of Kings Co. El. R. R. Co.*, 105 N. Y. 97; *Ghee v. N. U. Gas Co.*, 34 App. Div. 551; 158 N. Y. 510.) Neither the board of electrical control nor its predecessors were in 1896 the "municipal authorities" of the city of New York. (*Maxmilian v. Mayor, etc.*, 62 N. Y. 160; *Tone v. Mayor, etc.*, 70 N. Y. 157; *Heiser v. Mayor, etc.*, 104 N. Y. 68; *D., L. & W. R. R. Co. v. City of Buffalo*, 65 Hun, 464; *People ex rel. W. G. Co. v. Deehan*, 153 N. Y. 530.)

WILLARD BARTLETT, J. The rights of the parties to this litigation are dependent upon the question whether on October 30, 1896, the power to grant a franchise to lay and construct suitable wires or other conductors in subways under streets, avenues, public parks and places in the city of New York for conducting and distributing electricity, to a corpo-

ration organized under the Transportation Corporations Law, was vested in the board of electrical control in and for the city of New York, or in the board of aldermen of said city.

The appellant is a corporation organized under subdivision 2 of section 61 of the Transportation Corporations Law (Laws of 1890, chap. 566) the objects for which it was created being stated in its certificate of incorporation as follows: "Manufacturing and using electricity for producing light, heat or power and in lighting streets, avenues, public parks and places in the City and County of New York."

The respondent is a corporation organized for constructing electrical subways in the streets, public parks and public places in the city of New York for holding electrical conductors including those of electric lighting companies duly organized and authorized to conduct business in the borough of Manhattan. Under date of July 27, 1886, and April 7, 1887, this corporation entered into certain contracts with the board of commissioners of electric subways in and for the city of New York (the predecessor of the board of electrical control) whereby it undertook to build, equip, maintain and operate subways for electrical conductors in said city, in accordance with plans and specifications furnished by the board, and by the terms of which it was permitted to lease space in such subways as therein provided. The legislature expressly ratified these contracts by chapter 716 of the Laws of 1887. The first of these contracts contains the following provision, the respondent corporation being the party of the second part:

"V. The spaces in said subway shall be leased by the party of the second part to any authorized company, person or firm operating or intending to operate electrical conductors in any street, avenue or highway in the city of New York that may apply for the same."

The second contract, in relation to the same subject, provided as follows:

"IV. The space in said subways shall be leased by the party of the second part to any company or corporation having lawful power to operate electrical conductors in any street, avenue

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or highway in the city of New York that may apply for the same, including any company or corporation having, or which shall acquire lawful power to manufacture, use or supply electricity."

The act by which these contracts were ratified expressly empowered the courts to enforce their provisions "by proper proceedings in the nature of a writ of mandamus or by mandamus." (Laws of 1887, chap. 716, § 7.)

The same act established the board of electrical control to succeed the board of commissioners of electrical subways as constituted under an earlier statute (Laws of 1885, chap. 498) and contained the following provision in respect to its powers :

"All the powers and duties conferred or imposed by the said act, chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five, upon the commissioners appointed thereunder in and for the city of New York, and all the powers and duties heretofore by any law conferred or imposed upon the local authorities of said city, or any of them, in respect to or affecting the placing, erecting, construction, suspension, maintenance, use, regulation or control of electrical conductors or conduits or subways for electrical conductors in said city are hereby transferred to and conferred and imposed upon, and shall hereafter be exclusively exercised and performed by the said board of electrical control, constituted as provided in this act, and its successors as hereinafter provided."

Assuming that the authority thereby conferred was broad enough to empower the board of electrical control to grant a franchise to occupy the subways with electric conductors, the appellant on October 26, 1896, applied to the board "to grant to the said company the franchise to erect and maintain wires as its business in the city of New York may require, under such regulations as may be prescribed by the said Board ;" and on October 30, 1896, the board adopted a resolution declaring that the West Side Electric Company "be and it hereby is authorized and empowered to lay and construct

suitable wires and other conductors in subways, under streets, avenues, public parks and places in the city of New York for conducting and distributing electricity under the direction of the Board of Electrical Control," etc.

The West Side Electric Company subsequently obtained permits from the commissioner of water supply, gas and electricity to place two cables in the electrical subways of the respondent to be used for electric lighting purposes, and in June and December, 1903, exhibited such permits to the respondent and requested the respondent to open its manholes and service boxes so as to allow the installation of the appellant's cable in the subway. The respondent refused to comply with this request. It denied the right of the board of electrical control to grant a franchise to the appellant to operate electrical conductors in the streets of the city of New York and asserted that the only municipal authority having power to grant such a franchise on October 30, 1896, was the board of aldermen.

Under chapter 37 of the Laws of 1848, which was an act to authorize the formation of gas light companies, such corporations could acquire the power to lay conductors for conducting gas in the streets of a city, village or town only with the consent of the municipal authorities. Under chapter 512 of the Laws of 1879, which was an act to authorize gas-light companies to use electricity instead of gas, a similar consent of the municipal authorities was necessary to empower such corporations to occupy the streets of a city, town or village, with apparatus for electric lighting purposes. These provisions were incorporated into the Transportation Corporations Law (Laws of 1890, chap. 566, § 61) under which the appellant was organized. Subdivision 1 of section 61 empowers gas companies to manufacture, sell and furnish such quantities of gas as may be required in the city, town or village where the same shall be located; "and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways in such cities, villages and towns, *with the consent of the municipal authorities thereof*," etc. This subdivision was under

consideration by this court in the case of *Ghee v. Northern Union Gas Co.* (158 N. Y. 510) presently to be discussed. Subdivision 2 of section 61 empowers a company incorporated for the purpose of using electricity for light, heat or power to carry on the business of lighting by electricity or using it for heat or power in cities, towns and villages within this state; "and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places of such cities, towns or villages for conducting and distributing electricity, *with the consent of the municipal authorities thereof*, and in such manner and under such reasonable regulations as they may prescribe." The question is who were the municipal authorities in the city of New York whose consent was thus required at the time when the board of electrical control assumed to give such consent to the West Side Electric Company. The appellant contends that they were the members of the board of electrical control; the respondent insists that they were the board of aldermen. .

We are of opinion that the board of aldermen were in 1896 the municipal authorities contemplated by the language which has been quoted from the Transportation Corporations Law. The giving of the consent prescribed by that statute is the grant of a franchise. The act of 1887 conferred no express power to grant such a franchise upon the board of electrical control nor are we able to discover that it was conferred by implication. That statute contained no enactment to the effect that the board of electrical control should be deemed to be the municipal authorities whose consent was made essential to the grant of a gas lighting or electric lighting franchise by the acts of 1848 and 1879 subsequently embodied in section 61 of the Transportation Corporations Law. The right to grant or withhold consent to the occupation of the streets of a municipality for electric lighting purposes is one thing; the right to regulate such occupation after consent is given is another. The act of 1887 was passed only in the exercise of the latter right. The purpose of that act seems to have

been to vest in the board of electrical control the amplest administrative authority to regulate the exercise of rights after they should have been acquired, but not to bestow upon the board any authority to participate in the creation of such rights. This function of supervision could be vested in the board by the legislature in the exercise of the police power. (See *People ex rel. N. Y. Electric Lines Co. v. Squire*, 107 N. Y. 593.) Beyond that the legislature did not attempt to go. It left the franchise-giving power delegated by the state just where it was before, in the hands of the same municipal authorities. This court decided in *Ghee v. Northern Union Gas Co.* (*supra*) that the municipal assembly constituted the municipal authorities whose consent was essential to confer a franchise upon a gas company in the city of New York under subdivision 1 of section 61 of the Transportation Corporations Law, and the reasoning in that case requires a similar conclusion as to who were the municipal authorities who must consent before an electric light company could in 1896 acquire the right under subdivision 2 of the same section to lay down its conductors within the limits of the city. The board of aldermen then possessed the powers which belonged to the municipal assembly in 1899 when the *Ghee* case was decided, and the consent of the board of aldermen was, therefore, requisite at that time under section 61 of the Transportation Corporations Law in order to confer upon a corporation a gas lighting or electric lighting franchise to be exercised by the occupation of any portion of the streets of New York.

It is not deemed necessary to repeat the arguments which led to the result reached in the *Ghee* case, many of which are equally applicable here.

We are asked to adopt the interpretation of the act of 1887, which would sustain the position of the appellant on the ground that for several years the statute was practically construed in accordance with that view by various public officers in the city of New York. It is to be noted, however, that these officers did not all agree that such was the correct construction. The language was not ambiguous nor

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was the meaning doubtful when other legislation on the same subject-matter was taken into consideration. There is no room for the application of the doctrine of practical construction in the case of a statute free from ambiguity or not subject to any reasonable doubt as to the meaning of its provisions, particularly when these are considered in the light of contemporaneous legislative enactments in *pari materia*. "Where no ambiguity or doubt appears in the law we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow extrinsic circumstances to introduce a difficulty where the language is plain." (Cooley's Const. Limitations [6th ed.], p. 84.)

Basing our conclusion on the language of the various statutory provisions involved as well as on the authority of *Ghee v. Northern Union Gas Co.* (*supra*), we think that the judgments below were right and should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; O'BRIEN, J., absent.

Judgment and order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
GEORGE H. GRANGER, Appellant.

MURDER — WHEN ERRONEOUS INSTRUCTION AS TO DEGREE IS HARMLESS. Where, upon the trial of an indictment for murder, the court has charged that in case the jury has reasonable doubt as to the defendant's guilt of murder in the first degree its duty is to determine as to whether he was guilty of murder in the second degree and if in doubt as to that degree, its duty is to acquit, a refusal to charge that it might convict of manslaughter in one of its degrees is erroneous, if there is any evidence bringing the case within the definition of manslaughter in the first degree. Such error, however, is harmless where the defendant is convicted of murder in the first degree, thus indicating that the jury had no doubt as to his guilt of the greater offense; therefore, the failure to instruct that it had the right to convict of manslaughter in the first degree, a lesser degree than that of murder in the second degree, could not have prejudiced the defendant.

(Argued November 15, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Supreme Court, rendered December 5, 1905, at a Trial Term for the county of Dutchess upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Charles Morschauser for appellant. Upon the evidence as produced and the charge of the court withdrawing from the jury the consideration of manslaughter in the first degree, the jury could not have rendered any other verdict than that of murder in the first degree; therefore, under section 444, in view of the defendant's evidence, the jury could have found a verdict of manslaughter in the first degree, which right to so find was withdrawn by the court and withheld from the defendant, and is error. (*People v. Young*, 96 App. Div. 33.)

William R. Lee, District Attorney, for respondent. The refusal of the court to charge that under the evidence the defendant might be found guilty of manslaughter in either of the degrees was correct, for the reason that there was no evidence presented in the case from which the jury might have inferred that the wound was inflicted in the heat of passion without intent to cause the death of the decedent. (*People v. Degarmo*, 73 App. Div. 46; *People v. Downs*, 56 Hun, 5; *People v. Rego*, 3 N. Y. Cr. Rep. 275.)

HAIGHT, J. The defendant was employed by one Charles M. Lutz, a farmer and dairyman, in the town of Pawling, Dutchess county, N. Y., through an employment agency in the city of New York. He remained some five or six days, until the morning of the 29th day of June, 1905, when he desired to quit and was thereupon paid off by Lutz, who, at the time, took a roll of bills from his pocket, which the defendant saw. He then took his clothing, in a dress-suit case, to the railroad station at Pawling, where he left it and spent the day in the immediate locality of the village until evening when he returned to Lutz's barn and remained over

night. The next morning he left the barn between half-past five and six o'clock, and went down to a place in the highway midway between the Lutz farm and the village of Pawling and there remained until Lutz came along with his team and a low milk wagon carrying nine or ten cans of milk, which he was taking to the milk factory. He then stopped Lutz and had some conversation with him with reference to returning to work, after which Lutz passed on toward the milk factory at Pawling. The defendant remained in the roadway, walking back and forth until Lutz returned and then they had a further talk, and then, as Lutz was about to drive on, the defendant pulled his revolver from his pocket and fired, the bullet striking Lutz back of the ear, passing through the head and lodging in the frontal bone. Lutz immediately fell over backward on to the milk cans and died. The defendant, thereupon, took from Lutz's pocket a watch and about eighty dollars in money and then hurried to the railroad station at Pawling where he got his dress-suit case and took a train for New York. After arriving in New York he procured some refreshments, got shaved, purchased some articles of wearing apparel and then went to the employment agency and asked for a watch that he had left there on pawn. He was then met by an officer who arrested him and took from him the watch, money and revolver.

Upon the trial the People submitted evidence, in substance, that the defendant, after his arrest in New York, made a confession in the presence and hearing of several police officers to the effect that he saw a large roll of bills in Lutz's possession when he took his money out of his pocket to pay the defendant his wages; that shortly after that he determined to rob him, and that instead of returning to New York he remained in the village and vicinity during the day and night for the purpose of finding an opportunity to carry out his purpose; that this was accomplished next morning when Lutz was returning from the milk factory, in the manner already described. Other testimony was presented on behalf of the People to the effect that he was seen by other people a num-

ber of times during the afternoon on the 29th and on the morning of the 30th, passing from the barn to the highway, and while he was walking back and forth upon the highway and during the two interviews that he had with Lutz, first when he was going to the milk factory and again upon his return.

The defendant was sworn as a witness in his own behalf and conceded the killing and robbery, but claimed that he was under the influence of liquor at the time; that he had no intention of killing either Lutz or of robbing him until after he saw that he had killed him, and that then he robbed the body for the purpose of obtaining funds to get away. The district attorney submitted evidence controverting the claim of the defendant that he was intoxicated. The only question, therefore, left for the determination of the jury was the degree of crime for which the defendant should be convicted. The evidence was such as to justify the verdict of the jury that he was guilty of murder in the first degree upon either theory, that the killing was with deliberation and premeditation, or for the purpose of effecting a robbery. The trial judge, in his charge, instructed the jury properly with reference to the question of intoxication, if such was found to be his condition. He also instructed the jury that in case they entertained a reasonable doubt as to the defendant's guilt of murder in the first degree, that then it was their duty to determine as to whether he was guilty of murder in the second degree; and if they entertained a reasonable doubt with reference to his guilt in that degree, then it was their duty to acquit. The defendant's counsel then asked the court to charge that they might convict of manslaughter in one of its degrees. To this request the judge replied that he saw no evidence in the case from which the jury could find the defendant guilty of any of the degrees of manslaughter, and, therefore, withdrew from the jury the consideration of those questions. To this an exception was taken by the defendant's counsel, and this presents the only serious question in the case which we deem it necessary to here discuss.

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Under the provisions of the Penal Code (§ 189) manslaughter in the first degree is defined as a homicide when committed without a design to effect death by a person in the heat of passion by the means of a dangerous weapon. A loaded revolver, such as was used by the defendant in effecting the death of Lutz, is a dangerous weapon within the meaning of the Code. Referring to the testimony of the defendant, given upon the examination of his counsel, he stated he did not know just how it happened, but being under the influence of liquor when Lutz refused to take him back he said, "I was angry and mad and I just remember pulling out my gun and shooting him. There was no thought or desire in my mind that I recall to kill or hurt him. I was under the influence of liquor. After I had shot him I saw what I had done. I thought the best thing to do was to hurry up and get away from there. I thought of looking to see if he had any money. My object of getting money at that time was to get away from there as quickly as I could, as soon as I realized what I had done. I took his money and his watch and went right down toward the station and from there I went to Dover Plains first and finally reached New York." Upon his cross-examination he said that when Lutz returned from the milk factory he was driving two horses attached to a low milk wagon; that he asked Lutz if he could come up and stay until Sunday; that the horses were stopped in the highway at the time and when Lutz turned around to go and before he had started the horses, he shot him. He says: "When he turned to go his head was rather sidewise toward me, when he turned round to go he was facing Mr. Wanzer's place, looking at the horses. I was standing on the road beside him, right at the side of the seat. When he turned to go that left the side of his head toward me and then I shot." The defendant was also permitted by the court, over the objection of the district attorney, to read from the *New York Evening Journal* of July 1st an interview, which a reporter of that paper had had with the defendant, in which he stated, "I waited by the road until Lutz came along, then something suddenly flashed over

my mind. I do not know what it was but it impelled me to do as I did. The refusal of the farmer to keep me while I was sick, my destitute condition and my failure in life, I believe, were the causes."

It will be observed that, neither upon his cross-examination nor in his interview which he gave to the reporter of the paper, which he was permitted to put in evidence, did he say anything about his being in the heat of passion or that he was mad. That only appears in his direct examination when questioned by his own counsel. But that, doubtless, was sufficient to bring it within the definition of manslaughter in the first degree, and under the provisions of the Code of Criminal Procedure upon an indictment for a crime consisting of different degrees the jury may find the defendant not guilty of the degree charged in the indictment, but guilty of any of the degrees inferior thereto authorized by the evidence. We are, therefore, of the opinion that the evidence, to which we have alluded, would have entitled him to have the jurors consider the question of manslaughter in the first degree, had they not reached the conclusion that he was guilty of murder in the first degree. Of course, the court could not coerce the jurors and force a conviction for a greater crime than they would otherwise have found him guilty of, by withholding from their consideration a lesser degree authorized by the evidence and instructing them to acquit if they did not find him guilty of the greater crime. But, as we have seen, the defendant was indicted, charged with the crime of murder in the first degree. This involved the intentional killing, with deliberation and premeditation, or of the killing with the intent to rob. The court submitted to the jurors the question as to the defendant's guilt under this charge and also instructed them as to the statutory definition of murder in the second degree, and instructed them that, in case they entertained a reasonable doubt as to his guilt of the crime charged they might determine the question as to his guilt of the lesser offense. The jurors, therefore, were not coerced into rendering a verdict in the first degree; for, under the charge of

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the court they had the right to convict in the second degree. The fact that they did not convict him of the lesser degree, indicated that they had no doubt as to his guilt of the greater offense, and, therefore, the failure to instruct them that they had the right to convict of manslaughter in the first degree, a lesser degree than that of murder in the second degree could not well have harmed the defendant. Had they entertained a doubt with reference to his guilt in the first degree the defendant would have been entitled to the instruction by the court that, in case they entertained a reasonable doubt with reference to his guilt in the second degree, then they might consider that of manslaughter in the first degree.

Our conclusion, therefore, is that the jury having convicted the defendant of the crime of murder in the first degree under the charge that it had the power to convict in the second degree, the charge asked for with reference to manslaughter became immaterial and, therefore, resulted in no harm or error that calls for a reversal of the judgment.

The judgment of conviction should be affirmed.

CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur. VANN, J., not voting.

Judgment affirmed.

MARGARET E. HANLON, Respondent, v. CENTRAL RAILROAD
COMPANY OF NEW JERSEY, Appellant.

NEGLIGENCE, OF RAILROAD CONDUCTOR IN ASSISTING PASSENGER TO ALIGHT FROM A CAR AT A STATION. While a railroad company is under no obligation to supply the aid of servants in assisting passengers to alight from cars at stations, yet where a conductor, as in this case, assumed to assist a passenger in so doing, and did it in such a negligent manner, by suddenly withdrawing his support, as to cause a fall, the company is liable for the resulting injury, since the passenger had the right to rely upon the conductor's careful performance of his undertaking.

Hanlon v. Central R. R. Co. of New Jersey, 110 App. Div. 918, affirmed.

(Argued December 13, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 8, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Robert Thorne for appellant. Neither the conductor nor the defendant company rested under any obligation or duty whatever to render any assistance to the plaintiff in alighting from the train. (3 Thomp. on Neg. § 2845; *Raben v. C. I. Ry. Co.*, 73 Iowa, 579; *W. & A. R. Co. v. Earwood*, 29 S. E. Rep. 913; *Lafflin v. B. & S. R. R. Co.*, 106 N. Y. 136.) The defendant should not be held responsible for an accident arising out of a voluntary act of courtesy on the part of the conductor any more than if it were an act of another passenger. (*Green v. M. V. R. R. Co.*, 31 App. Div. 413.)

J. Stewart Ross and *Walter G. Rooney* for respondent. The defendant is responsible for the injuries and damage caused by the carelessness and negligence of its conductor in removing his support and assistance tendered by him, and on which the plaintiff was justified in relying and was depending. (*Drew v. S. A. R. R. Co.*, 26 N. Y. 49; 3 Thomp. on Neg. § 2852; *Foss v. B., etc., R. Co.*, 66 N. H. 256; *I., etc., R. Co. v. Anderson*, 15 Tex. Civ. App. 180; *W., etc., R. Co. v. Voils*, 98 Ga. 446; *Werner v. C., etc., R. Co.*, 105 Wis. 300; *Macer v. T. A. R. Co.*, 15 J. & S. 461; *Hickey v. R. R. Co.*, 14 Allen, 429; *Sweeney v. R. R. Co.*, 10 Allen, 368; *Hulbert v. N. Y. C. R. R. Co.*, 40 N. Y. 145; *S. L., etc., R. Co. v. Baker*, 67 Ark. 531; *M., etc., R. Co. v. White*, 22 Tex. App. 424.)

GRAY, J. The plaintiff, a passenger in a train upon the defendant's railroad, had arrived at her destination in Jersey City and, while stepping from the car to the station platform, was injured by falling to the ground. It appears from the

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evidence that plaintiff was in the act of descending the car steps, when the train conductor reached out his hand to help her; taking her arm by the elbow. Before she had stepped down upon the platform, the conductor withdrew the support of his hand and she fell between the platform and the car. She had a verdict and the judgment thereupon has been affirmed below. As the case presented a question of some novelty, if not of some interest, in the law of negligence, leave was given to the defendant to further appeal to this court.

The charge of negligence made in the complaint was that "one of the servants of the defendant, in the course of his employment, took hold of the plaintiff's arm to assist her in alighting and, * * * negligently and without warning, removed his hand * * * and, by reason thereof," she was thrown to the ground. The jury had been instructed that there was no claim of defects in steps, or in platform, and "that the defendant was under no duty, through its employees, or otherwise, to assist this plaintiff in alighting from the train." At the close of the charge the court was then requested by the defendant to instruct the jury, further, "that the defendant was not liable for the carelessness, if any, of the conductor in performing a gratuitous courtesy to the plaintiff." This request was refused and the appellant argues that therein the trial court erred. It must be admitted that, if the request stated the correct rule of law, the refusal of the instruction to the jurors was most material and would entitle the defendant to a retrial of the issue.

To establish the charge of negligence, it was necessary, in this case, as in all others, to prove that the defendant had failed in some legal duty, owing from it as a carrier of passengers. The legal duty must have existed and its breach must have been shown in an imperfect performance of the contract of carriage, or in the inadvertent omission, or commission, of some act in the performance, the injurious results of which might have been foreseen by a reasonably prudent person. It is clear enough that the test here is, whether the conductor of the train, in thus proffering his aid

to the plaintiff upon her arrival at her destination, was acting within the scope of his employment. I suppose that the contract of carriage required the safe transportation of the plaintiff from the one to the other station and that that meant, if platforms were provided for passengers, from platform to platform. The contract implied the supply of proper agencies for its performance, in engines and cars for conveyance and in engineers, conductors and brakemen to control and regulate the movements of the train and the reception and discharge of passengers. So far as the defendant's duty related to the transportation of the plaintiff upon its road, it had been performed and the only question is whether its contractual relation with her extended to a responsibility for the act of its servant in charge of the train, in the final act of discharging her from the car. It was not bound to furnish her any personal assistance in leaving the car; for she was, so far as the case shows, in the possession of her faculties and of good health, and was capable of moving about alone. There was nothing defective about the car platform and steps. The conductor of the train stood there, however, and, voluntarily, undertook to guide and to support her in descending from the car.

The cases, to which we are referred, do not necessarily control, in so far as a similarity in circumstances is required, and I find none which is precisely parallel. Cases where the servant has negligently assisted a passenger in alighting from a train, which has carried him beyond his station and stops at an unsuitable place for getting off; or where the preparations for alighting were defective and unsafe; or where the servant procured, and negligently assisted, a person to get on board of a moving car, do not present quite this point, of a voluntary act of assistance proffered by the servant to, and availed of by, a passenger, where none was called for, and so carelessly performed as to be the cause of injury. (*Drew v. Sixth Av. R. R. Co.*, 26 N. Y. 49; *Foss v. Boston, etc., R. R.*, 66 N. H. 256; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300; *Missouri, etc., R. Co. v. White*, 22 Texas Civ. App. 424.)

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A conductor is placed in a position of responsible control by the company and he is bound to exercise the greatest care in seeing to the safety of the passengers. He is invested with such apparent authority over them as, reasonably, to induce their confidence in and compliance with his directions and, as well, their reliance upon his acts. The situation, in this case, it is true, was not such as to suggest any serious danger to the plaintiff in leaving the car; but, when the conductor assumed to extend his aid in doing so, she had the right to accept it and to rely upon his act being a careful one. In the abstract, the instruction asked for was correct, that the company was not liable for carelessness in the performance by its servant of a gratuitous courtesy to the plaintiff; but, as requested, the jurors could only have understood it as referring to the situation which was presented by the evidence. Therefore, as applied to the facts, it was correctly refused.

I think we must reach the conclusion that, while the defendant was under no obligation to supply the aid of a servant in assisting the plaintiff to descend from the car, yet, as the conductor undertook to do so, she had the right to rely upon that official's careful performance of his undertaking and to hold the defendant responsible for any failure on his part to use reasonable care.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

A. EDSALL DAVIS et al., Appellants, v. ALLASEBA BLISS,
Respondent.

1. PERSONAL PROPERTY—CONDITIONAL SALE—WHEN VENDORS OF PERSONAL PROPERTY, SOLD UNDER CONDITIONAL SALE AND ATTACHED TO REAL ESTATE OWNED BY THIRD PARTY, MAY RECOVER FOR THE SAME. The vendors of an engine under a conditional sale may recover in conversion for the amount unpaid on the same after default by their vendee, against a vendor under contract of real estate to which said engine has been attached by said vendee, who was also the vendee under and had

made default upon the real estate contract, where the engine is so attached to the real estate that it can be detached and removed without serious damage or injury to the real estate and where the vendor of the latter has parted with no value and lost no rights on account of such engine, and, upon demand by the vendors of the engine, the vendor of the real estate has refused to let the former remove the engine from the premises.

2. SAME — DAMAGES — EFFECT OF SECTION 116 OF THE LIEN LAW (L. 1897, CH. 418) UPON THE CONTRACT OF CONDITIONAL SALE IN QUESTION. Provisions in the contract of conditional sale, that the title of the engine should remain in the vendors until the purchase price should be paid in full, and that upon default in payment the vendors could retake the engine without process of law, all moneys paid to be considered as having been paid for the use or damage of the engine, must be considered as modified by section 116 of the Lien Law (L. 1897, ch. 418) which provides that personal property, retaken by a vendor under a contract of conditional sale, shall be retained for a period of thirty days, during which the vendee, or his successor in interest, may comply with the contract and thereupon receive the property, and if, at the expiration of such period, such terms are not complied with the vendor may cause the property to be sold at public auction; and where the vendors of such engine made a demand for the same upon the owner of the real estate, which was refused, and thereupon brought an action for the full value of the engine at that time, such vendors can only recover the amount remaining unpaid on the engine at the date of such conversion thereof; since, at that date they merely had the right to retake the engine, and for thirty days hold it subject to redemption by defendant, upon payment of the unpaid purchase price, and, to avoid circuity of action, defendant was entitled to defeat their claim for possession of the engine by paying or tendering the amount unpaid thereon.

Davis v. Bliss, 105 App. Div. 636, reversed.

(Argued November 15, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 5, 1905, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Israel T. Deyo for appellants. By the defendant's refusal to deliver the engine the plaintiffs have been deprived of their property without their consent and without process of

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law. (*Miller v. Race*, Smith's L. C. [9th Am. ed.] 750; *Cross v. Marston*, 44 Am. Dec. 353; 24 Am. & Eng. Ency. of Law [2d ed.], 480-482; *Andrews v. Powers*, 66 App. Div. 216; *Jermyn v. Hunter*, 93 App. Div. 175; *McMillan v. Leaman*, 101 App. Div. 436; *Voorhees v. McGinnis*, 48 N. Y. 278; *Meagher v. Hayes*, 152 Mass. 228; *Fuller-Warren Co. v. Harter*, 10 Wis. 80; *Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 N. Y. 28.) The facts and circumstances attending the installation of the engine in question on defendant's real property were wholly insufficient to impress it with the character of real estate, so that the title would pass to defendant upon Lyon's surrender of his land contract. (*McMillan v. Leaman*, 101 App. Div. 438; *Potter v. Cromwell*, 40 N. Y. 287; *Voorhees v. McGinnis*, 48 N. Y. 278; *Hoyle v. P., etc., R. R. Co.*, 54 N. Y. 314; *Kribbs v. Alford*, 120 N. Y. 519; *G. M. M. Co. v. Quinn*, 76 N. Y. 23; *Cochran v. Flint*, 57 N. H. 514; *Gen. Electric Co. v. T. E. Co.*, 57 N. J. Eq. 460; *Shoemaker v. Simpson*, 16 Kan. 43; 1 Washb. Real Prop. [4th ed.] 8.) The defendant having had constructive, if not actual, notice that Lyon would or might put upon the property machinery subject to lien for purchase price, and having thus consented thereto, can have no other or better rights in the engine than Lyon had, and cannot either in law or upon principles of equity and good conscience claim title thereto as against plaintiffs. (*Ford v. Cobb*, 20 N. Y. 349; *Sheldon v. Edwards*, 35 N. Y. 279; *Voorhees v. McGinnis*, 48 N. Y. 278; *Tift v. Horton*, 53 N. Y. 377; *Curtis v. Riddle*, 7 Allen, 185; *Hendy v. Dinkerhoff*, 57 Cal. 3; *Burrill v. W. L. Co.*, 65 Mich. 571; *Harris v. Hackley*, 127 Mich. 46; *Kerby v. Clapp*, 15 App. Div. 37.)

Carlos J. Coleman for respondent. The engine having been attached to the mill became a part of the realty as between the plaintiffs, the vendors of the engine, and the defendant, the vendor of the mill property, notwithstanding the agreement between the plaintiffs and Lyon that the title

to the same should remain in the plaintiffs until paid for, and the defendant upon regaining possession of the mill property after Lyon had defaulted in his contract for the purchase of the same was not obliged to pay for the engine or the appliances connected therewith or submit to their removal. (*McFadden v. Allen*, 134 N. Y. 489, 490; *Voorhees v. McGinnis*, 48 N. Y. 278, 282; *Chandler v. Hamell*, 57 App. Div. 305; *Ford v. Cobb*, 20 N. Y. 344; *Smyth v. Sturgis*, 108 N. Y. 495; *Andrews v. Powers*, 66 App. Div. 216; *McMillan v. Leaman*, 101 App. Div. 436; *Hutchins v. Materson*, 46 Tex. 551; *Haven v. Emory*, 33 N. H. 69.) The fact that this engine was placed in the mill by Lyon, instead of the plaintiffs, without the knowledge or consent of the defendants, does not make any difference as to the legal rights of the parties to this action. (Broom's Leg. Maxims, 463; *Pinkham v. Mattox*, 53 N. H. 604; *Fifield v. F. Nat. Bank*, 148 Ill. 163; *Spencer v. Spencer*, 3 Jones Eq. 404; *Voorhees v. McGinnis*, 48 N. Y. 278; *Trustees, etc., v. Smith*, 118 N. Y. 634.)

HISCOCK, J. There is involved in this action the question whether a vendor of personal property under a conditional sale may recover in conversion for the same after default by his vendee, against a vendor under contract of real estate to which said personal property had been attached by said vendee, who was also the vendee under and had made default upon the real estate contract.

The trial court and the Appellate Division by a divided vote held that he could not. We think this decision was erroneous and must be reversed.

Plaintiffs, being manufacturers of gasoline engines, sold one to one Lyon under a written contract whereby the purchase price of \$922.50 was to be paid, part upon delivery and the remainder in three installments, it being expressly agreed that the title to such machinery should remain in said vendors until said purchase price was paid in full, and in default of payment, or any part thereof, the vendors were authorized to

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take charge of and remove said property without process of law, all moneys paid being considered as having been paid for use of or damage to the machine.

Lyon at the time of delivery was in possession of certain real estate consisting of a mill, under a contract with defendant for the purchase of the same by payment to be made in installments. Said contract contained two special clauses to which reference will be made hereafter. One of these provided for payment to the extent of \$1,000 by "improvement of said property by labor, repairs and new machinery, unincumbered by mechanic's lien, mortgage or purchase price." The other was to the effect that all improvements, repairs or machinery placed upon the premises should become a part of the realty not to be removed without the consent of the vendor.

Lyon installed the engine in the building on the premises by placing and bolting the same upon and to a substantial foundation constructed of cement and other materials and by running an exhaust pipe from the floor of the engine room through the floor, ceiling and roof of the building, and by connecting the engine by two underground pipes with a gasoline tank set outside the building and also by belts with the shafts in the mill.

After he had paid all but part of one of the installments upon the engine and some expenses alleged to have been contracted in his behalf by plaintiffs, he made default in his contract and by a written instrument attempted to turn back and surrender said engine to them. He likewise had become in default upon his contract with defendant, and upon the day following the delivery of said last-mentioned instrument surrendered to her the premises with the engine still attached thereto. There having been a demand by plaintiffs for the latter and refusal by defendant, this action of conversion was brought.

We shall assume that under ordinary circumstances the engine would have become a part of the realty. Upon the other hand, we regard it as too well settled to require discus-

sion that the results which would ordinarily flow from attaching such a piece of personal property as this was to the real estate in such a manner as this was attached may be controlled by special circumstances, and the character of the article as personal property be preserved not only as against the vendee but also, in the absence of statutory provision, as against the mortgagee, owner and, under certain circumstances, the subsequent grantee of the real estate.

The agreement between plaintiffs and Lyon clearly and conclusively, as matter of law, indicated the intent of those parties that the engine should remain personal property until it was paid for, and this agreement under the circumstances of this case, was binding upon defendant. (*Tift v. Horton*, 53 N. Y. 377; *Kerby v. Clapp*, 15 App. Div. 37; *Godard v. Gould & Strong*, 14 Barb. 662; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Phoenix Mills v. Miller*, 4 N. Y. S. R. 787, 790.)

While the cases cited do not happen to have arisen between the vendor of personal property under a conditional sale and the vendor of real property under a contract of sale to the vendee of the personal property, it is manifest that no more favorable rule should apply in favor of such a vendor of real property who, as in this case, has not advanced or lost anything on account of the annexed personal property, than would apply in favor of a mortgagee or subsequent grantee of the premises.

Without quoting from the opinions in the cases referred to, it may be briefly stated that their reasoning is fully broad enough to cover this case.

Because, as stated, the defendant did not in any manner part with value or lose any rights on account of the engine attached to the premises, there is no opportunity for the operation of any principle of estoppel and various authorities cited in her counsel's brief relating to cases of purchasers for value are rendered inapplicable.

We do not lose sight of the provision in her contract with Lyon, that all the machinery placed upon the premises should become a part of the realty. While it was competent to

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make this arrangement between her and her vendée, they could not, of course, make an agreement whereby would be destroyed the superior rights of plaintiffs, they not being a party to the agreement. In fact, the other clause quoted from defendant's contract with Lyon to the effect that new machinery "unincumbered by mechanic's liens, mortgage or purchase price," would be accepted in payment, fairly justifies the inference that the parties to that contract contemplated the installment upon the premises of machinery which would be subject to certain rights in favor of the vendor thereof for any unpaid purchase price.

Considerable stress is placed by respondent upon the circumstance that when Lyon installed plaintiffs' engine he took out an old one which was in the building and appropriated to his own use some small proceeds derived from the sale of the latter. It is not, however, perceived that this has any effect upon the rights of the parties to this action. The old engine was removed and the new one installed without knowledge upon the part of defendant, and, therefore, there was no consent by her to the removal of the old and the appropriation of its proceeds by Lyon in reliance upon its being replaced by the new one. If she has been wronged by what took place she has her right of action against the wrongdoer.

It doubtless is the rule that personal property may be so firmly attached to or thoroughly and substantially made a part of the realty that its character as personalty will not be preserved even by special agreement intended to accomplish that result. But that is not the present case. The evidence shows undisputedly, and the referee has found, that the engine in question could readily be detached and removed from the building without tearing down any part of or causing any serious damage to the latter and without at all destroying or impairing the usefulness of the former. The case in this respect is more favorable to the plaintiffs than were some of those cited *supra*, and *Duntz v. Granger Brewing Co.* (41 Misc. Rep. 177, affirmed without opinion, 184 N. Y. 595), where it was held that the attachment of personal property to

realty was not sufficient to destroy its character as personal property against one entitled to claim it as such.

The more troublesome question arises as to the extent of the recovery which plaintiffs should be permitted to have upon the facts as they now appear. At the time of the alleged conversion their real, equitable interest in or on account of the engine consisted of a claim for the small unpaid portion of the purchase price, plus, possibly, for we do not decide that, some claim for disbursements on account of their vendee. Their agreement, however, with the latter, as we have seen, provided for their retaining general title to the property until all of the purchase price had been paid, and they have brought this action upon the assumption that thereby they were entitled to full and general possession and retention of the engine, or in lieu thereof to recover its full value at the time of the conversion, and that they are not limited in recovery as for a special interest therein to the amount unpaid on it.

There has been disagreement in the authorities of other states over this question in the case of a conditional sale. It was held that recovery could be had as for a special interest only to the extent of the unpaid purchase price in *Johnston v. Whittemore* (27 Mich. 463); *Morton v. Frick Co.* (87 Ga. 230); *Woods v. Nichols* (21 R. I. 537); *Rose v. Story* (1 Pa. St. 190).

Upon the other hand, the principle was upheld that a recovery could be had for the full value of the property in *Colcord v. McDonald* (128 Mass. 470); *Brown v. Haynes* (52 Me. 578); *Buckmaster v. Smith* (22 Vt. 203); *Angier v. Taunton Paper Co.* (1 Gray, 621).

While our attention has not been called to any authority in which this question has been extensively discussed by the courts of our own state, it has necessarily been involved in cases and the weight of the decisions and the tendency of whatever was said is in favor of limiting the recovery of the conditional vendor to the amount unpaid upon his chattel.

In *Berner v. Kaye* (14 Misc. Rep. 1, 4) a recovery was

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allowed for the full value of the chattel, but it did not appear that any payments had been made and for that reason the court refused to sustain the contention made for the first time upon appeal that the recovery was excessive.

In *Arosemena v. Hinckley* (11 J. & S. 43) the court limited the recovery to the value of the chattel, less the amounts paid on the purchase price thereof.

In *Godard v. Gould* (14 Barb. 662) the court assessed the plaintiff's damages at an amount which the statement of facts prefixed to the opinion shows must have been the value of the property as reduced by payments.

In *Kerby v. Clapp* (15 App. Div. 37) a recovery was allowed for what is stated in the annexed opinion of the referee to have been the full value of the property, but it would rather appear (p. 38) that nothing had been paid. At least the contrary did not appear.

But if it should be held that upon the bare agreement of conditional sale as it was written by the parties, plaintiffs would be entitled to recover the full value of their engine without regard to the payments which had been made thereon, we think that this agreement was so modified by statute as to limit the recovery to the amount unpaid.

Section 116 of the Lien Law (Chapter 418, Laws of 1897), provides that: "Whenever articles are sold upon the condition that the title thereto shall remain in the vendor * * * until the payment of the purchase price, * * * and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest, may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction." When Lyon abandoned his contract and surrendered possession of the real property, including the engine, to the defendant, she became his successor in interest within the meaning of the statute quoted,

for we do not think that his prior purported transfer of the engine to plaintiffs, after default to both plaintiffs and defendant, unaccompanied by any delivery of possession, changed the situation of the parties. At that time, whatever rights defendant had, could not be impaired in such manner. Plaintiffs' right to succeed in this suit is to be decided by conditions as they existed at the time when they brought it. At that date they merely had a right to retake the engine, and for thirty days hold it subject to redemption by defendant, claiming through Lyon, upon payment of the unpaid purchase price, and, to avoid circuity of action, defendant was entitled to defeat their demand for possession of the engine by paying or tendering the amount unpaid thereon. Therefore, at the time when the action was commenced, under this statute plaintiffs' situation was not unlike that of a mortgagee with part of his mortgage unpaid, and it is well settled that such a party in case of a conversion by the mortgagor or his successor in title would be limited to a recovery of an amount equal to such unpaid portion. (*Clark v. McDuffie*, 49 N. Y. S. R. 535; *Chadwick v. Lamb*, 29 Barb. 518; *Allen v. Judson*, 71 N. Y. 77; *Parish v. Wheeler*, 22 N. Y. 494.)

We think the same measure must be applied to plaintiffs and that their damages must be limited to the amount which was unpaid on account of the engine at the date of conversion, it not being intended, for lack of sufficient evidence, to pass upon the item for alleged expenses in connection with the engine.

The judgment should be reversed and a new trial granted, with costs to abide event.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

TONY WAMSER, Respondent, v. BROWNING, KING & COMPANY,
Appellant.

BAILMENT — WHEN SHOPKEEPER NOT LIABLE FOR LOSS OCCURRING THROUGH NEGLIGENCE OF CUSTOMER. In an action to recover for the loss of articles stolen from a retail clothing store, it appeared that the plaintiff went to a clerk engaged with another customer and was directed to go to a designated table and wait upon himself, which he did; for the purpose of trying on the garments he desired to purchase, he laid aside, on an adjoining table, his coat and vest containing his watch, chain and cigar cutter; no other clerk was in the immediate vicinity to watch the clothing; a number of persons were in the store examining goods, passing and repassing; while plaintiff was engaged in trying on garments the vest and its contents were stolen. *Held*, that the loss occurred through his own negligence, and a recovery could not be sustained.

Wamser v. Browning, King & Co., 109 App. Div. 53, reversed.

(Argued November 23, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 27, 1905, affirming a judgment of the Appellate Term which affirmed a judgment in favor of plaintiff entered upon a decision of the Municipal Court of the city of New York.

The nature of the action and the facts, so far as material, are stated in the opinion.

Clarence E. Thornall for appellant. Plaintiff himself was negligent, as he did not take ordinary care of his property. (*Trowbridge v. Schriever*, 5 Daly, 11.)

Max Schleimer and *Louis Levene* for respondent. As a voluntary custodian for profit to itself, the defendant was bound to use care of plaintiff's property and for the omission was properly held liable. (*Burnett v. Stern*, 122 N. Y. 539; *Woodruff v. Painters*, 150 Penn. St. 91; *Adams v. N. J. St. Co.*, 151 N. Y. 163; *Morris v. T. A. R. R. Co.*, 1 Daly, 202; *Arthur v. Pullman Co.*, 44 Misc. Rep. 229; *Markoe*

v. *Tiffany Co.*, 26 App. Div. 94; *Lockwood v. M. S. Co.*, 28 App. Div. 68.)

HAIGHT, J. This action was brought to recover the value of a watch, chain and cigar cutter, which were stolen from the plaintiff in defendant's store. The defendant is a corporation engaged in conducting the business of a clothing store in the city of New York.

The plaintiff, in company with one Ernest Mayer, a friend, called at the defendant's store for the purpose of purchasing a garment and went to Stumpf, a clerk with whom they were acquainted and asked for a vest. Stumpf was then engaged in waiting upon another customer, but according to the plaintiff's testimony, told him that the vests were piled up on a table some distance away on the side of the store, pointing to it; that he could go over and help himself; that he could select a vest, lay his clothing on an adjoining table and try it on and that he would come over as soon as he could get through with the customer that he was attending. The plaintiff thereupon went to the table, selected a vest, took off his coat and vest and tried the new one on in the presence of his friend and companion. At the time there were quite a number of persons in the store examining goods and the clerks were busy. After ten or fifteen minutes Stumpf finished with the customer upon whom he was attending and then came over to the plaintiff. The plaintiff then handed to him the vest that he had tried on and told him to do it up, that he would take it, and turned to put on the clothing that he had laid aside upon the adjoining table. In the meantime his companion had departed. He found his coat but his vest was missing, in the pockets of which were the watch, chain and cigar cutter. Search was immediately made by the plaintiff, Stumpf the clerk and others, but it could not be found.

The Municipal Court rendered judgment for the plaintiff for the value of the watch, chain, etc., and this judgment was affirmed by the Appellate Term and Appellate Division.

Upon the argument of this case in this court the question was discussed by counsel as to whether a recovery could be had for articles of jewelry which were in the pockets of the stolen garment, the contents of the pockets not having been disclosed to the defendant or any of the clerks in its employ, but under the view taken by us of the case it becomes unnecessary to determine that question.

In the case of *Bunnell v. Stern* (122 N. Y. 539) the question of the liability of proprietors of retail stores was considered in this court. In that case the plaintiff went to a store for the purpose of purchasing a wrap. She was attended by a saleswoman and had selected a garment and then took off her cloak in the presence of the saleswoman and tried on the wrap. She laid it upon a counter in presence of the saleswoman who was attending upon her and in front of another saleswoman who saw her lay it down. She then tried on the wrap and in the course of four or five minutes turned to get her cloak but found that it had been stolen in the meantime. In that case it was held that the defendant was guilty of negligence and was liable for the loss; that it was the duty of those conducting a retail store to exercise reasonable care with reference to the property of their customers which is laid aside temporarily upon the invitation of the dealer and with his knowledge in order to examine an article or determine whether it will fit.

The question now arises as to whether the plaintiff's claim is brought within the rule of that case. We think it is not. As we have seen, the plaintiff went to the clerk Stumpf. Stumpf was engaged with another customer and so told him. He, however, pointed to a table upon which the vests were piled and told the plaintiff that he could go over there and wait upon himself. The plaintiff did go to the table designated, in company with his companion, and together they selected a vest. The plaintiff then laid his coat and vest upon an adjoining table and tried on the vest selected. At that time he knew that Stumpf was occupied with another customer some distance away and was not there to personally

watch and care for the garments laid aside. No other clerk was in the immediate vicinity to watch the clothing. The plaintiff knew of the contents of the pockets of his vest that he laid upon the table and yet with nothing to occupy his attention other than the trying on of a vest, his vest and its contents were permitted to be stolen almost in front of his own eyes and within six feet from the place where he stood. Had Stumpf, the clerk, been present attending upon him, and the clothing had been laid aside by his invitation before his eyes so that he had an opportunity to watch and care for it, a different question would have been presented. We, therefore, are of the opinion that the loss occurred through the negligence of the plaintiff and that the judgments should be reversed and a new trial granted, with costs to abide event.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgments reversed, etc.

FRANK L. FISHER COMPANY, Appellant, v. ROBERT L. WOODS,
Respondent.

1. APPEAL—WHEN CERTIFICATION NOT REQUIRED UPON APPEAL FROM UNANIMOUS DECISION—CODE CIV. PRO. § 191, SUBD. 2. Under the statute (Code Civ. Pro. § 191, subd. 2), an action brought to recover for services rendered is appealable to the Court of Appeals from a unanimous affirmance of a judgment by the Appellate Division, with the permission of the latter court without any question of law being certified.

2. SAME—EXCEPTIONS TO CONCLUSIONS OF LAW. A contention that the appellant in such action has no standing in the Court of Appeals to review such judgment, for the reasons that the exceptions taken by the appellant are to the conclusions of law which were proposed by itself and found by the trial court in conformity with the appellant's own requests, is untenable where the record fails to show that the conclusions of law were proposed by the appellant or that the trial court found in conformity with its requests.

3. PENAL CODE, SECTION 640D—UNCONSTITUTIONAL UNDER FEDERAL AND STATE CONSTITUTIONS (U. S. CONST. ART. 1, § 10 AND 14TH AMENDMENT; N. Y. STATE CONST. ART. 1, §§ 1 AND 6). Section 640d of the Penal Code (L. 1901, ch. 128), which provides that "in cities of the first and second class, any person who shall offer for sale any real property

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without the written authority of the owner of such property, * * * shall be guilty of a misdemeanor," is an improper and unreasonable exercise of the police powers of the state, vested in the legislature, and violative of the Federal and State Constitutions (U. S. Const. art. 1, § 10, and 14th amendment; N. Y. State Const. art. 1, §§ 1 and 6), in that it is an arbitrary infringement upon the liberty and rights of all persons who engage in selling real estate for others, with or without compensation, by making the person employed and acting without written authority guilty of a misdemeanor and punishable as a criminal.

P. L. Fisher Co. v. Woods, 110 App. Div. 890, reversed.

(Argued November 28, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 22, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Harry Hull for appellant. Section 640d of the Penal Code as enacted by chapter 128 of the Laws of 1901 is not a proper exercise of the police power of the state. (*Lochner v. New York*, 198 U. S. 45; *Lawton v. Steele*, 152 U. S. 133; *Matter of Jacobs*, 98 N. Y. 98; *People ex rel. Tyroler v. Warden*, 157 N. Y. 130.) Section 640d of the Penal Code is in violation of the State and Federal Constitutions in that it is an unwarrantable interference with the liberty of the citizen, and it deprives the citizen of his property without due process of law. (*Crossman v. Cuminez*, 79 App. Div. 15; *Cody v. Dempsey*, 86 App. Div. 335; *Alleyer v. Louisiana*, 165 U. S. 578; *B. U. Co. v. Crescent City Co.*, 111 U. S. 757; *Barbier v. Connolly*, 113 U. S. 27; *Lochner v. New York*, 198 U. S. 45; *Schnair v. N. H. & I. Co.*, 182 N. Y. 8.) Section 640d of the Penal Code is in violation of the 14th amendment of the United States Constitution in that it denies to citizens the equal protection of the laws. (*Barbier v. Connolly*, 113 U. S. 27; *B. U. Co. v. C. City Co.*, 111 U. S. 746; U. S. R. S. § 1977.)

John T. Sackett and *Richard M. Bruno* for respondent. The only question asked by the plaintiff, appellant, to be certified to the Court of Appeals on its motion for that purpose was the constitutionality of chapter 128 of the Laws of 1901; but the only question certified by the order of the Appellate Division is described to be "a question of law" merely. The question to be decided is not formulated. Nothing is certified and nothing can be reviewed. (*C. Bank v. Sherwood*, 162 N. Y. 310; *Devlin v. Hinman*, 161 N. Y. 115.) Chapter 128, Laws of 1901, is a valid exercise of the police power of the State, and is in no respect unconstitutional. (*People ex rel. Armstrong v. Warden*, 183 N. Y. 225; *People v. Havnor*, 149 N. Y. 195; *People v. Stedeker*, 75 App. Div. 449; *Whiteley v. Terry*, 83 App. Div. 197; *Williams v. People*, 24 N. Y. 405; *Matter of Bayard*, 25 Hun, 546; *Mallett v. North Carolina*, 181 U. S. 589; *People v. Lochner*, 177 N. Y. 145; 198 U. S. 45; *People ex rel. Nechamcus v. Warden, etc.*, 144 N. Y. 529; *Bohmer v. Haffen*, 161 N. Y. 390.)

HAIGHT, J. This action was brought by the plaintiff, a corporation engaged in the business of real estate brokerage, to recover compensation for services which it claims it had rendered the defendant with reference to the sale or exchange of certain real property in the city of New York.

The trial court has found as facts that on or about the first day of July, 1904, the defendant entered into an oral agreement with the plaintiff by which it was to sell or exchange for defendant certain real property specifically described, and that the plaintiff, pursuant to such agreement, procured a customer therefor, who was willing to take the property upon the terms agreed upon, and that its services were of the fair and reasonable value of fifteen hundred dollars; but, as conclusions of law, the court found that the plaintiff had no cause of action, for the reason that it had no written authority to sell, or offer for sale, the property, pursuant to the provisions of chapter 128 of the Laws of 1901, known as section

640d of the Penal Code. Judgment was, therefore, entered in favor of the defendant, dismissing the plaintiff's complaint, with costs.

The contention is now made that the plaintiff has no standing in this court to review the judgment, for the reason that the exceptions taken by the plaintiff are to the conclusions of law which were proposed by itself and found by the trial court in conformity with plaintiff's own requests, and that the appeal was taken pursuant to section 190 of the Code of Civil Procedure and that the Appellate Division in giving leave to appeal to this court did not certify any question to be reviewed. In answer to this contention our examination of the record fails to show that the conclusions of law were proposed by the plaintiff, or that the trial court found in conformity with its requests. If the plaintiff did prepare the findings and conclusions of law, by the direction of the trial court after the announcement of a decision as to the disposition that should be made of the case, we apprehend the plaintiff would not be estopped from taking exceptions to the conclusions.

The action was to recover compensation for services rendered and is, therefore, brought within the provisions of subdivision two of the second paragraph of section 191 of the Code of Civil Procedure, and, therefore, no questions were required to be certified. (*Young v. Fox*, 155 N. Y. 615.)

The only other question which we are called upon to review is whether the statute referred to is violative of the provisions of the Constitution of this state or of the United States. The provisions involved in the discussion are to the effect that no member of this state shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers; nor be deprived of life, liberty or property without due process of law; nor shall any state deny to any person within its jurisdiction the equal protection of its laws; or enact any law impairing the obligations of contracts. (Art. 1, §§ 1 and 6 of

the State Constitution ; art. 1, § 10, and 14th amendment of the United States Constitution.)

The learned judges of the Appellate Division of the first and second departments have had the provisions of this statute under consideration and have reached different conclusions. Able and exhaustive opinions have been written by them referring to the authorities which tend to support their respective positions and there is but little that we can add to the discussion, farther than to choose between them the conclusion which we deem to be the wisest and the best supported by the authorities. (*Grossman v. Caminez*, 79 App. Div. 15 ; *Whiteley v. Terry*, 83 App. Div. 197 ; *Cody v. Dempsey*, 86 App. Div. 335.)

The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety or the lives, health and morals of our inhabitants or the welfare of the community. But the legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution nor prevent him from adopting and following any lawful profession, trade or industrial pursuit not injurious to the community that he may see fit ; nor prevent him from making contracts with reference thereto. To justify the state in interposing its authority in behalf of the public, it must appear that the interest of the public generally, as distinguished from those of a particular class, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions

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upon lawful occupations. The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. (*Health Department v. Rector, etc.*, 145 N. Y. 32; *People v. Gillson*, 109 N. Y. 389; *Colon v. Lisk*, 153 N. Y. 188; *Lawton v. Steele*, 152 U. S. 133; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116; *Stuart v. Palmer*, 74 N. Y. 183; *Gilman v. Tucker*, 128 N. Y. 190, 200, and authorities in each case cited.)

We are thus brought to the consideration of the validity of the act and its construction under the rules referred to. It is as follows: "In cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor." It will be observed that its provisions not only include real estate agents and brokers, but *any person* who shall offer for sale real property without written authority, and that it makes no distinction between persons who are working for pay and those who are rendering their services gratuitously without any thought or expectation of compensation. Hence, it follows that if a person, who has been orally requested by his neighbor to offer his real estate for sale for a sum stated, should go to another person and offer the same for sale he would become a criminal under the provisions of this statute even though he rendered the services gratuitously without thought, wish or expectation of compensation.

The business of a real estate agent or broker or of any

person who engages his services to an owner of real estate to hunt up and procure a purchaser, through advertisements or otherwise, is perfectly lawful and legitimate, and persons engaged in that business are entitled to as full a protection of their rights under the Constitution as that of any other person engaged in any of the other professions, trades or occupations. It may be that there are dishonest persons engaged in the business of real estate agents, but it is equally true that dishonest persons are found in every occupation. The act in question does not purport, nor is it intended, to protect the purchaser of real property. Usually he is introduced to and concludes his purchase with the owner, but should he rely upon the false representations of the agent with reference to his authority and conclude his contract with such agent, parting with value therefor, it would be larceny, and the agent would become liable to be punished. The only object and purpose apparent is to shield the landowner from being compelled to pay for services rendered, unless the person rendering the services can show written authority therefor. In the real estate business the owner has a shield from unjust claims, that does not exist with reference to many other professions, trades or occupations. The agent is not entitled to his commissions until he brings to the owner a purchaser and their minds meet upon the terms. The owner can, therefore, always refuse to receive or enter upon negotiations with a person introduced by a real estate broker who has not been authorized by him. If, therefore, the legislature, in the exercise of its police powers, may, by this act, lawfully make it a misdemeanor for a person to render services to an owner in procuring a purchaser without his written authority, it may also provide that a lawyer should be guilty of a misdemeanor for drawing a contract for a client, or for rendering him any other service, without having authority therefor in writing. It would also be competent to place like restrictions upon every employee in every trade and occupation. It is difficult to see how there could be any limitation to the power of the legislature in this direction. To

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our minds this is going too far. It is an arbitrary infringement upon the liberty and rights of all persons who choose to engage in such occupation. Had the act been for the purpose of regulating the business of brokerage, or a statute of frauds, a different question would have been presented, but it is neither. It relates, as we have seen, to any and every person, and instead of making the oral contract void, it makes the person employed guilty of a misdemeanor and punishable as a criminal. Undoubtedly, the power of the legislature, to enact what shall amount to a crime, is exceedingly large, but as was said by PECKHAM, J., in *People v. Gillson (supra)*: "That there is a limit even to that power under our Constitution we entertain no doubt, and we think that limit has been reached and passed in the act under review." So, we conclude with reference to this act.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, CH. J., O'BRIEN, EDWARD T. BARTLETT, VANN and WILLARD BARTLETT, JJ., concur; CHASE, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
WILLIAM HUSON, Respondent.

APPEAL—QUESTIONS OF LAW IN CRIMINAL CASES RAISED ONLY BY EXCEPTIONS. The fact that the Appellate Division certifies that a judgment of a County Court convicting the defendant of the crime of assault in the first degree, under an indictment for manslaughter in the first degree, was reversed "upon questions of law only," for the reason indicated in its opinion that the facts did not constitute the crime for which a conviction was had, does not enable the Court of Appeals to pass upon the question, in the absence of any exception taken upon the trial raising it; no court can create an error of law by certifying that there is one, and a question of law in a criminal case can be raised only by an exception; the Appellate Division itself had no power to pass upon the question and its order must be reversed and the judgment of conviction affirmed.

People v. Huson, 114 App. Div. 693, reversed.

(Argued December 6, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 12, 1906, which reversed a judgment of the Cayuga County Court rendered upon a verdict convicting the defendant of the crime of assault in the first degree and granted a new trial.

The facts, so far as material, are stated in the opinion.

Robert J. Burritt, District Attorney (*Albert H. Clarke* of counsel), for appellant.

Amasa J. Parker and *Frank M. Leary* for respondent.

VANN, J. The defendant was indicted for the crime of manslaughter in the first degree, which is taking human life without a design to effect death, but was convicted of assault in the first degree, which is an assault made with intent to effect death, or to commit a felony upon person or property. (Penal Code, §§ 189, 217.) The Code of Criminal Procedure provides that "upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence." (Code Cr. Pr. § 444; L. 1900, ch. 625.)

The evidence warranted the jury in finding that on the 9th of January, 1905, the defendant with intent to kill, struck one Dernberg on the head twice with a flatiron and that on the 25th of the same month said Dernberg died from the wounds thus inflicted. They could also have found, however, that he would not have died from the effect of such wounds had he not constantly violated the orders of his physician. There was no evidence to warrant a finding that the assault was made with intent to commit a felony upon person or property.

The Appellate Division reversed the judgment of the County Court, but by its amended order the reversal is certified to have been made "upon questions of law only, the facts having been examined and no error found therein." The

opinion indicates that it reversed because manslaughter negatives the idea of an intent to kill, while it is an essential element in the crime of assault in the first degree. That was a question of law, but it was not raised by any exception. No court can create an error of law by certifying that there is one, and a question of law in a criminal case prosecuted by indictment can be raised only by an exception. The Appellate Division could have reversed because the verdict was against the weight of evidence, but they did not and we cannot. There is no exception in the record to justify the reversal. Those relating to the evidence and the charge raise no reversible error. There was no motion made at the close of the evidence that the court should advise an acquittal, or that the defendant should be discharged. There was no exception to the charge that the jury could convict of assault in the first degree and no request made to charge upon that subject. When the case was submitted to the jury, therefore, the defendant was in the attitude of consenting that they might pass upon the evidence and also of acquiescing in the charge that they could convict of assault in the first degree, notwithstanding the indictment was for manslaughter in the first degree.

There was a motion for a new trial but the order denying it brings up nothing for us to review. There was a motion for an arrest of judgment, but that brought up only the jurisdiction of the court over the subject of the indictment, which is not disputed, and the question whether the facts stated constitute a crime, meaning, of course, the facts stated in the indictment. (*People v. Meakim*, 133 N. Y. 214, 219; Code Cr. Pro. §§ 323, 331, 467.) It is not claimed that the facts stated in the indictment do not constitute a crime, although it is strenuously insisted, as the Appellate Division held, that they do not constitute the crime for which the defendant was convicted. However, when the court charged the jury that they could convict him of an assault in the first degree, notwithstanding the indictment was for manslaughter in the first degree, the defendant made no objection and took no exception. He acquiesced in that instruction and was apparently

satisfied with it. If the trial judge had been asked to charge in accordance with the present contention of the defendant, and he had refused, an exception to the ruling would have brought up the question upon appeal. The defendant, however, refrained from so doing, perhaps because he thought that portion of the charge upon which he seeks to overturn the judgment was favorable to him, inasmuch as manslaughter in the first degree "is punishable by imprisonment not exceeding twenty years," while assault in the first degree "is punishable by imprisonment for a term not exceeding ten years." (Penal Code, §§ 192, 220.) The sentence of the defendant was imprisonment for one year and eight months, which, in view of the evidence, does not impress us as severe. In no way did the defendant call the attention of the trial court to the position he now takes, or try to procure a ruling which would permit us to consider it. The power given us to reverse in a capital case without an exception, under certain circumstances, is withheld in all others. (*People v. Grossman*, 168 N. Y. 47; Code Cr. Pro. §§ 527, 528.)

We have no power to pass upon the question of law which led the Appellate Division to reverse, because it was not raised by an exception. That learned court was in the same situation with reference to that question, although it had ample power with reference to other questions not open to us. We are thus compelled to reverse their determination because they had no power to make it.

The order appealed from should be reversed and the judgment of conviction affirmed.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur.

Ordered accordingly.

BETSIÉ FREEDMAN et al., Appellants, v. WILLIAM OPPENHEIM,
Respondent.

REAL PROPERTY — WHEN TITLE BY ADVERSE POSSESSION, ALTHOUGH ESTABLISHED BY PAROL TESTIMONY, IS MARKETABLE. Title by adverse possession clearly established, although by parol evidence, is a marketable title; and where it appears in an action to compel specific performance of a contract to exchange real estate that the plaintiffs have a record title, perfect except as to two defects, which cannot be considered on this appeal, that they and their predecessors have had possession thereunder for a period of thirty-eight years and that during that entire period no person has made any claim of ownership to the premises, other than those from whom the plaintiffs derived their title, a decree, based upon a conclusion of law, that the plaintiffs have a good and indefeasible title to the premises by adverse possession, is properly granted.

Freedman v. Oppenheim, 102 App. Div. 622, reversed.

(Submitted December 7, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 20, 1905, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hugo Hirsh and *Frank Rosenberg* for appellants. The deed was perfectly good between the parties. (L. 1896, ch. 547; *Smith v. Boyd*, 101 N. Y. 477; *Enders v. Sternberg*, 2 Abb. Ct. App. Dec. 31.) Plaintiffs' title by adverse possession was absolute. (Code Civ. Pro. §§ 369, 370; *Scholle v. City of New York*, 119 N. Y. 613; *Simis v. McElroy*, 160 N. Y. 156; *Edwards v. Noyes*, 65 N. Y. 126.)

George Edwin Joseph for respondent. It was incumbent in plaintiffs to prove facts which would obviate the risk of further litigations in defense of the title. (*Simis v. McElroy*, 160 N. Y. 156; *Heller v. Cohen*, 154 N. Y. 299.)

HAIGHT, J. This action was brought to compel a specific performance of a contract to exchange real estate, bearing date the 11th day of September, 1901. The defendant refused to accept the plaintiffs' title on the grounds: *First*, that there was outstanding in one Mary Jane Houseman a one-fifth interest in the property, and *second*, that one James M. Cruser, who was the owner of the other four fifths of the premises in question, had never conveyed the same. Upon the first trial of this action it appeared that in 1834 one Jacob Houseman was the record owner of the premises in question, and that he died intestate, leaving five children, four of whom conveyed their interest in 1844 to Morris H. Cruser, but no conveyance was found from his daughter Mary Jane Houseman. There was, however, evidence from one Susan L. Houseman, a niece of Mary Jane Houseman, to the effect that Mary Jane died at the age of twelve years and was buried in the Staten Island cemetery which belonged to the church on the terrace, and that she had often seen the tombstone marking her grave; that it remained until four or five years ago when the graveyard was removed to another place; that the source of her knowledge was the statement of her father and mother and the family talk which she had often heard. If she died after her father and at the age of twelve years, she must have died intestate, unmarried and without issue, thus leaving her four remaining brothers her only heirs at law, whose title passed under their conveyance in 1844. As to the second objection made, to the effect that James M. Cruser never conveyed the title vested in him, it appears that he resided in Gloucester, Virginia, and that on the second day of June, 1845, a power of attorney purporting to have been executed by him, in which he appointed Edwin R. L'Amoureux his attorney in fact to convey the premises. This power of attorney was acknowledged before Edward E. McLane, a notary public in the city of Norfolk, Virginia, who certified that on the second day of June in the year 1845, "personally appeared before me the within named James Monroe Cruser, to me known and acknowledged the above

letter of attorney to be his act and deed." It is now contended that this power of attorney is void, for the reason that the notary did not certify that he knew the person who appeared before him to be the person described in the power of attorney. It is also claimed that there is a defect in the certificate executed by the clerk of the Hustings Court of the city of Norfolk, who, instead of certifying in accordance with the statute that he was acquainted with the handwriting of the notary, only certified that he was duly commissioned and qualified, and that full faith and credit were due to all his acts as such. L'Amoureux as attorney in fact did convey the premises, but for the defects referred to the Appellate Division reversed the judgment and ordered a new trial. (80 App. Div. 487.) Upon the new trial the court found as facts: "That one Isaac F. Tysen on or about the 3rd day of April, 1866, purchased the aforesaid premises in Richmond County, and contracted to be conveyed by the plaintiffs to the defendant herein, from Maria A. Nesmith and Thomas Nesmith, her husband, and received a warranty deed of said premises conveying to him the fee thereof; that said deed was on the 4th day of May, 1866, duly recorded in the office of the Clerk of Richmond County, in Liber 65 of Deeds, page 156. That at the time of the conveyance of said premises to said Isaac F. Tysen, the same were, and ever since have been protected by a substantial inclosure, repairs to which, from time to time, were made by said Isaac F. Tysen. That immediately after the receipt of said deed the said Isaac F. Tysen entered upon and into possession of said premises under claim of title and exclusive of any other right, founding his claim under said written deed as being a conveyance of the said premises, and that from time to time he has improved said premises. That said Isaac F. Tysen held possession of said premises under said deed until 1888, in which year he died intestate, and said premises descended to his only son and heir at law Robert F. Tysen, who went into possession of said premises under said deed and exclusive of any other right, and who con-

veyed said property to the plaintiff on August 29th, 1901, by a deed which was recorded in the Richmond County Clerk's office on September 12th, 1901, in Liber 286 of Deeds, at page 466. That immediately upon receipt of said deed the plaintiffs entered upon and into possession of said premises under the said deed and exclusive of any other right; that no claim of ownership of said premises other than by said Isaac F. Tysen, Robert F. Tysen and the plaintiffs has been made since the year 1866," and, as conclusions of law, that the plaintiffs have a good and indefeasible title to the aforesaid premises by adverse possession. Again, judgment was entered for the plaintiffs and again the Appellate Division has reversed. It does not appear in the order that the reversal was upon the facts, and we must, therefore, presume that the reversal was upon the law. (Code of Civil Procedure, section 1338.) The findings of fact are supported by the evidence. Indeed, they are substantially copied from the undisputed testimony of the witnesses.

Inasmuch as the trial court has not based its conclusions of law upon the record title shown by the plaintiffs, the alleged defects upon which the former reversal was based may not now be raised. Had they been raised by appropriate findings we should hesitate about condemning the record title, for the evidence with reference to the death of Mary Jane Houseman at the age of twelve years was sufficient to authorize a finding of fact to that effect, and as to the power of attorney to L'Amoureux and the deed executed by him which were made in 1845, nearly sixty years before the trial of this action, the court might have found, under the circumstances, that they were ancient documents entitled to be admitted in evidence, notwithstanding the alleged defects in the acknowledgment and certificate referred to. Indeed, it has been held repeatedly that a deed appearing to be of the age of thirty years may be given in evidence without proof of execution if such account of it be given as may, under the circumstances, afford the presumption that it is genuine. (*Enders v. Sternbergh*, 2 Abb. Ct. App. Dec. 31-36; 3 Johns. Cas. 283; *Hewlett v. Cock*,

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7 Wend. 371; *Martin v. Rector*, 24 Hun, 27, 28; *Ensign v. McKinney*, 30 Hun, 249-253; *Troup v. Hurlbut*, 10 Barb. 354; *Hoopes v. Auburn Water Works Co.*, 37 Hun, 568-571; affirmed, 109 N. Y. 635; *McKinnon v. Bliss*, 21 N. Y. 206-211.) But in the absence of such findings the judgment must stand or fall upon the finding that the plaintiffs have title by adverse possession.

Upon the question of adverse possession it will be found, upon comparing the findings with the requirements of the Code of Civil Procedure (sections 369-370) that the plaintiffs' claim of title under a written instrument for upwards of twenty years, in every respect conforms to the requirements of the Code. It is contended, however, that the defendant ought not to be compelled to accept a title which is dependent upon parol testimony, and our attention is called to the case of *Sims v. McElroy* (160 N. Y. 156). It is true that in that case there was a comment from the judge writing the opinion, to the effect that a party ought not to be compelled to take title to premises where he has got to defend his title by parol evidence, but in no place in the opinion does it appear that title by adverse possession clearly established does not in some instances furnish a marketable title. This question was fully considered in the case of *Heller v. Cohen* (154 N. Y. 299-311). In that case MARTIN, J., in delivering the opinion of the court stated: "There are cases where title by adverse possession may, and will, be upheld. If there is no disputed question of fact, and the possession has been clearly adverse and undisturbed for the required period, the title may be sustained. * * * To establish title by adverse possession, it must be shown that the person holding the possession did so in open hostility to the rights of the true owner." It is quite true, as the learned judge remarked in connection therewith, that titles by adverse possession are not looked upon with favor by persons contemplating the purchase of property; but he concedes that there are cases in which the title will be sustained, and the question here is as to whether the adverse possession in this case is such as to make the title of the plaintiffs

marketable. Here we have a record title in the plaintiffs perfect, except as to the two defects, to which attention has been called. We have possession shown thereunder, by uncontradicted testimony, since April 3rd, 1866, a period of thirty-eight years at the time of the trial of this action, and in addition to that we have the further finding that during that entire period no person has made any claim of ownership to the premises whatever, other than those from whom the plaintiffs have derived their title. Our conclusions, therefore, are that the findings sustained the conclusions of law and that in this case the title of the plaintiffs was marketable.

The order of the Appellate Division should be reversed and the judgment of the trial court affirmed, with costs in all courts.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, VANN and CHASE, JJ., concur; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

THE COUNTRY CLUB LAND ASSOCIATION, Appellant, v. FREDERICK LOHBAUER et al., Respondents.

1. REAL PROPERTY — ACTION TO RESTRAIN A TRESPASS — INSUFFICIENT PROOF OF EXCLUSIVE OWNERSHIP OF PREMISES. The facts examined in an action against one claiming to be the owner of an undivided half interest in the premises described in the complaint and his tenant, to restrain them from trespassing thereon, the plaintiff claiming to be the sole owner and entitled to the possession thereof, and held that there was sufficient evidence to support the findings of fact upon which was based a conclusion of law "that the plaintiff has failed to establish any exclusive right to the premises described in the complaint as against the defendants."

2. REMEDY OF TENANTS IN COMMON, A PARTITION SUIT: OF OWNERS IN SEVERALTY, EJECTMENT. Assuming without deciding that the principal parties to the action were tenants in common, the plaintiff had no authority to interfere with defendants' tenant, its duty being to so exercise its rights as not to interfere with those of its co-tenant; if the plaintiff is a tenant in common, its remedy is a partition suit; if the owner in severalty, its remedy is ejectment.

C. C. Land Assn. v. Lohbauer, 110 App. Div. 875, affirmed.

(Argued December 7, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 18, 1906, modifying and affirming as modified a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Philip E. Connell and *Philip H. Ade* for appellant. Injunction was the proper remedy. (*Clare v. Sawyer*, 2 N. Y. 498; *Curtis v. Fox*, 47 N. Y. 299; *Bank of Utica v. City of Utica*, 4 Paige, 399; *Coatsworth v. L. V. R. Co.*, 156 N. Y. 451; *Wheelock v. Noonan*, 108 N. Y. 179; *Baron v. Korn*, 127 N. Y. 224; *Avery v. N. Y. C. R. R. Co.*, 106 N. Y. 142; *Briestedt v. S. R. R. Co.*, 55 N. Y. 220; *Corning v. T. I. & N. Factory*, 40 N. Y. 206; *Lynch v. M. E. R. Co.*, 129 N. Y. 274; *Johnson v. City of Rochester*, 13 Hun, 285.) There is no proof that defendants have been in actual possession of plot "A," nor that any of their predecessors in title have been in possession. (*Price v. Brown*, 101 N. Y. 669; *Gardner v. Heart*, 1 N. Y. 528; *Churchill v. Onderdonk*, 59 N. Y. 134; *Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Roe v. Strong*, 107 N. Y. 350.) The wrongful acts of defendants entitle plaintiff to an injunction whether its title to plot "A" was in severalty, or whether plaintiff and the defendant Jenkins were tenants in common. (*Wood v. Phillips*, 43 N. Y. 152; *Freeman on Co-tenancy*, §§ 249-252; *Woods v. Early*, 95 Va. 307; *Weinmeister v. Ingersoll*, 47 Mich. 31; *Hawley v. Clowes*, 2 Johns. Ch. 122.)

George S. Espenschied, *S. M. Meeker* and *D. Meeker* for respondents. The legal title of defendants to the premises in question is complete and is sustained throughout by written evidence of the highest character, and the same is recorded and certified, and the source of their title being anterior to that of plaintiff and the deed through which it is derived having been first recorded, it follows that defendants' title is superior and paramount to that of plaintiffs, by reason not only of its priority of origin, but also by reason of its priority

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of record. (*Rayner v. Wilson*, 6 Hill, 469; *Jackson-Merrick v. Post*, 15 Wend. 588; *Hooker v. Pierce*, 2 Hill, 650; *Wood v. Chapin*, 13 N. Y. 509; *Ward v. Isbill*, 73 Hun, 550; *Clark v. Davis*, 28 Abb. N. C. 135; *Stevens v. Houser*, 39 N. Y. 302; *Dunham v. Townsend*, 118 N. Y. 281; *Clason v. Baldwin*, 13 N. Y. Supp. 681; *Wood v. Squires*, 1 Hun, 481; *Doughty v. Matzall*, 119 N. Y. 646; *Robert's v. Bergman*, 132 N. Y. 73.)

EDWARD T. BARTLETT, J. This action was commenced in May, 1897, for an injunction restraining the defendants from entering or trespassing upon certain premises and for other relief; it has been twice tried. On the first trial the plaintiff recovered a judgment which was reversed by the Appellate Division and a new trial ordered. (56 App. Div. 306.) On the second trial a judgment was entered dismissing the complaint on the merits. The Appellate Division, after modifying the judgment, affirmed it, without costs to either party; from that judgment this appeal is taken.

This action involves the title to certain premises consisting of one and 78-100 acres of land on the shore of Pelham Bay or Long Island Sound in Westchester, New York city, formerly in Westchester county, and known and designated on certain maps of the premises as plot "A."

The plaintiff corporation has insisted throughout this litigation that it has a title in severalty to plot "A." The defendant Jenkins, as sole surviving executor and trustee under the last will and testament of William Laytin, deceased, claims to be the owner of an undivided half interest in the premises, holding the same as tenant in common with the owner of the other half interest.

The trial court has found that William Laytin, the testator, on or about June 9th, 1858, acquired, with other property, an undivided moiety or half part of plot "A," and continued in the possession of the entirety thereof until his death in the month of November, 1874, at all times using and occupying said plot "A" and the bathhouse which was on the same at

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the time he acquired it, and which remained there during his lifetime and thereafter until supplanted by a new one that is there now; that under the will of said William Laytin, which was duly admitted to probate by the surrogate of Westchester county, letters testamentary were issued to the defendant, John G. Jenkins, and others, who took possession of certain premises, including plot "A;" that the executors on May 1st, 1876, leased to Ellen L. Davidson certain premises, including plot "A," of which said lessee remained in continued possession until May 1st, 1893; that on or about the last-mentioned date said Ellen L. Davidson assigned her lease to one William B. Duncan, Jr., who took possession of said premises and used and occupied the same, including said plot "A," until the first day of May, 1896; that John G. Jenkins, the defendant, is the sole surviving executor and trustee under the said will, and as such he leased to the defendant, Frederick Lohbauer, on the first day of June, 1896, for a term of five years, certain premises, including plot "A;" that the defendant, Frederick Lohbauer, took possession and occupied said premises, and resisted any interference with his possession attempted by the plaintiff, and sought always to prevent plaintiff or plaintiff's agents or employees, from trespassing thereon, until served with the injunction order obtained in this action.

The trial court found certain facts as to the defendant's complete chain of record title from John Ferris, the source thereof, who conveyed to one Robert Heaton on March 28th, 1792, which conveyance was recorded in Westchester county August 22nd, 1798. It is also found that William Laytin, in his lifetime, and his successors in title since his death, have been in actual possession of said premises in the entirety thereof from about June 9th, 1858, until on or about June 1st, 1896.

The plaintiff claims its source of title is under the will of one James Ferris, who died in 1783, but there is no recorded conveyance in that alleged chain of title until certain commissioners in a partition suit conveyed premises under a deed

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dated February 20th, 1819, which was not recorded until 1857.

In view of the various opinions that have been written by the learned Appellate Division in the course of this litigation, we deem it unnecessary to discuss in detail the conveyances adduced by opposing counsel in support of these conflicting chains of title, but content ourselves with stating the conclusions we have arrived at after a careful reading of the record in order to ascertain if there is any evidence warranting the findings of fact and the conclusions of law based thereon.

This court held in *Greenleaf v. B., F. & C. I. R. R. Co.* (132 N. Y. 408, 414) as follows: "It is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof. (*Jackson ex dem. Lewis v. Laroway*, 3 Johns. Cas. 283; *Jackson ex dem. v. Luquere*, 5 Cow. 221; *Hewlett v. Cock*, 7 Wend. 371; *Ensign v. McKinney*, 30 Hun, 249; *Rogers v. Allen*, 1 Camp. 309; *Doe v. Pulman*, 3 Ad. & El. [N. R.] 622; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Bristow v. Cormican*, L. R. [3 App. Cas.] 641-668; *Gardner v. Granniss*, 57 Geo. 539; *Whitman v. Heneberry*, 73 Ill. 109; 1 Green. Ev. §§ 21, 144; 1 Whart. Ev. §§ 199, 733; 2 Phill. Ev. [Edw. ed.] 477; Best's Ev. § 499; 1 Taylor's Ev. [8th ed.] §§ 87, 665.) While under this rule the judgment in partition and the subsequent deed to John Emmons were admissible in evidence without proof of contemporaneous possession of the land by the parties to the judgment and deed, yet they are not sufficient evidence of title of one who claims under them through mesne conveyances to recover in ejectment, without showing some subsequent or modern possession by the parties who have received later deeds which go to make up the plaintiff's chain of title."

We are of opinion that the defendant Jenkins, as executor

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and trustee, has adduced sufficient evidence to support the findings of fact upon which is based the conclusion of law "that the plaintiff has failed to establish any exclusive right to the premises described in the complaint as against the defendants."

In view of the issues as framed, and the course of the trial, a dismissal of the complaint is inevitable.

Assuming, without deciding, that the corporation plaintiff is a tenant in common with the defendant Jenkins as executor and trustee, the former was acting without warrant of law in its interference with Lohbauer, the tenant of the defendant executor and trustee, for it is the duty of a tenant in common so to exercise his rights as not to interfere with those of his co-tenant. If tenants in common are unable to agree, the obvious remedy is a partition suit. If the plaintiff could have established his ownership of the premises in severalty, his remedy was ejectment.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, WILLARD
BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

**ERIE COUNTY SAVINGS BANK, Appellant, v. CASPER SCHUSTER
et al., Respondents, Impleaded with Others.**

REAL PROPERTY — TAX TITLE PARAMOUNT TO LIEN OF PRIOR MORTGAGE — OWNER NOT A PROPER PARTY IN FORECLOSURE ACTION. A title resting upon a sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage, and those in possession under such title are not proper parties in an action for the foreclosure of the mortgage, since they cannot be required to defend their title in an equitable action, but are entitled to have their rights passed upon by a jury in a court of law.

Erie Co. Savings Bank v. Schuster, 107 App. Div. 46, affirmed.

(Argued December 18, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 12, 1905, reversing a judgment in favor of plaintiff

entered upon a decision of the court on trial at an Equity Term and directing a dismissal of the complaint as to the respondents herein.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adelbert Moot, Henry W. Sprague and William M. Wheeler for appellant. Under the conceded facts of this case the heirs of Barbara Schuster have no interest in the mortgaged premises, growing out of her purchase from the state of its interests, if any, acquired by the sale by the comptroller, for unpaid taxes. Their claim is based entirely upon the certificate of purchase which does not purport to confer a title or right to possession upon them, and any interest that may have been acquired thereunder has been forfeited by their default in the payment of the balance of the purchase price. (*Candee v. Heywood*, 37 N. Y. 653; *Williams v. Haddock*, 145 N. Y. 144.) Being in possession of the mortgaged premises the Schusters were proper and necessary parties defendant in the foreclosure action, and the trial court did not err in refusing to dismiss the complaint as to them. (1 *Wiltse on Mort.* 185; *Welsh v. Schoen*, 59 Hun, 356; *Ruyter v. Reid*, 121 N. Y. 498; *Hirsch v. Livingston*, 3 Hun, 9; *E. L. Assur. Co. v. Bostwick*, 100 N. Y. 628; *Phelan v. Brady*, 119 N. Y. 587; *Pope v. Allen*, 90 N. Y. 298; *Holland v. Brown*, 140 N. Y. 344; *Sidenberg v. Ely*, 90 N. Y. 357; *Burnett v. Austin*, 81 N. Y. 308; *Tilyou v. Reynolds*, 108 N. Y. 558.)

Edward R. Bosley, Norris Morey, Eugene V. Chamberlain and Robert Girvin for respondents. The title of the state of New York under the comptroller's deed is *prima facie* paramount and adverse to the title of the mortgagor and mortgagee, and, therefore, the trial court erred in not dismissing the complaint in this foreclosure action as to the respondents Schuster, as they claim under a purchase of that title, and its validity could not be tested here. (*Jacobie v.*

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Mickle, 144 N. Y. 237; *Merchants' Bank v. Thomson*, 55 N. Y. 11; *Oliphant v. Burns*, 146 N. Y. 218, 242; *Nelson v. Brown*, 144 N. Y. 384, 389; *Holcomb v. Holcomb*, 2 Barb. 20; *Frost v. Koon*, 30 N. Y. 428, 446; *Rathbone v. Hooney*, 58 N. Y. 463.) The title acquired by the state of New York, if valid, is absolute and independent of the title of the mortgagor and mortgagee, and paramount thereto in character. (*O'Donnell v. McIntyre*, 118 N. Y. 156; *Chard v. Holt*, 136 N. Y. 30; *Cromwell v. McLean*, 123 N. Y. 474; *Oliphant v. Burns*, 146 N. Y. 218; *Ostrander v. Darling*, 127 N. Y. 79.) The respondents Schuster claim under the paramount title of the state of New York by virtue of the purchase by Barbara Schuster in the year 1888 of all the state's interest in the property as evidenced by the certificate thereof, and the trial court erred in denying their motion to dismiss the complaint, in finding that their interest was inferior to the lien of the mortgage and in cutting off by foreclosure judgment their right, title and interest in the property. (2 Wigmore on Ev. §§ 1779, 2515; *Bradshaw v. Ashley*, 180 U. S. 59; *Thomson v. Smith*, 63 N. Y. 301; *Merchants' Bank v. Thomson*, 55 N. Y. 11; *E. I. Sav. Bank v. Goldman*, 75 N. Y. 127; *F. L. & T. Co. v. S. D. S. C. Co.*, 40 Fed. Rep. 105; *Gannon v. McQuin*, 160 N. Y. 476.)

O'BRIEN, J. This was an action for the foreclosure of a mortgage. Several persons were made defendants who have not appeared and judgment went against them by default. The defendants, the Schusters, however, appeared and answered, and the question involved in the case arises between these defendants and the plaintiff. The complaint contains the usual allegations in foreclosure cases. It alleges that the Schusters were in possession of the premises and claimed under some right or title inferior and subordinate to the lien of the mortgage and the usual relief in foreclosure cases was demanded against them, that is, that they be barred and foreclosed from all right, title and interest in the mortgaged premises. The Schusters, in their several answers, denied the

allegation of the complaint that they claimed under a title subordinate to the lien of the mortgage, and they alleged that they were in possession under a deed executed by the proper authorities upon a sale of the land for taxes that were levied subsequently to the mortgage in question.

At the opening of the trial the answering defendants requested the court to dismiss the complaint as to them, since it appeared from the pleadings that they claimed under a title paramount to the lien of the plaintiff's mortgage. The court denied their motion and proceeded to take proof as to the nature of the defendants' claim of title. When the proofs were closed it appeared that the lands covered by the mortgage had been sold for taxes levied subsequent to the execution of the mortgage, and that they were bid in by the state and were afterwards sold by the commissioners of the land office to the defendants. The defendants again requested the court to dismiss the complaint as to them, since it now appeared that their title was paramount to that of the plaintiff. The motion was denied and the defendants excepted. The trial court found the facts here stated and other facts as to the execution of the plaintiff's mortgage and the amount due thereon, and he directed that the defendants, including the Schusters, should be forever barred and foreclosed from any right, title and interest in the property. There was an exception to this finding.

The answering defendants appealed from the judgment to the Appellate Division and the decision of the trial court was there reversed and the complaint dismissed as to them and the plaintiff has appealed to this court. We think that the judgment is correct. The appeal of the plaintiff presents but two questions of law, and in the opinion of the learned court below these questions are fully discussed and the conclusion is fully sustained by the cases in this state. Both questions are quite familiar, and it is unnecessary to refer to the authorities upon which the conclusion is based. There can be no doubt that a title resting upon a sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage.

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The owner of such a mortgage has the statutory right of redemption upon giving notice to the public authorities as to his right and title, but it is unnecessary to discuss the proceedings to be followed in such a case, since it is not claimed that the plaintiff complied with the statute or is in an attitude seeking to redeem. The plaintiff simply insists that the lien of its mortgage is prior and superior to the title acquired by the tax sale. Upon that proposition the plaintiff rests its whole contention, and its position in this respect is obviously untenable.

It is equally clear that the defendants in this case, who were in possession under the tax title, were not proper parties to the action. Their title and possession cannot be assailed in an action to foreclose a mortgage, since they are entitled to defend their claim in a court of law in the usual way in which actions for the recovery of real property are tried. The defendants cannot be required to defend their title in an equitable action like this, but are entitled to have their rights passed upon by a jury in a court of law. It follows that the defendants had the right to object to have their title tried in this action, since it was not upon its face subordinate to the lien of the mortgage.

The judgment appealed from is right and should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur; HISCOCK, J., not sitting.

Judgment affirmed.

THE BANK OF AMERICA, Appellant, v. JOHN H. WAYDELL et al., Respondents.

1. **BANKING — RIGHTS OF BANK IN COMMERCIAL PAPER SENT TO IT FOR COLLECTION.** When a draft is delivered to the payee for collection only, which in turn remits it to its correspondent bank for collection, the latter acquires no better title to it or its proceeds than the payee, unless it becomes a *bona fide* purchaser of it for value or makes advances upon it in good faith without notice of any defect in title, and the mere existence of an indebtedness of the payee to the bank does not constitute it a holder for value.

2. **RESTRICTIVE INDORSEMENT.** An indorsement in blank accompanied by a letter stating that the enclosed draft was for "collection and credit" must be read together, and the effect is to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.

Bank of America v. Waydell, 103 A1 p Div. 25, affirmed.

(Argued December 14, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 6, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eldon Bisbee and *Charles E. Rushmore* for appellant. The plaintiff acquired a lien on the draft and is entitled to collect the same and apply the proceeds to the indebtedness of A. Ives & Sons to it. (*C. E. Bank v. F. Nat. Bank*, 118 N. Y. 443; *Castle v. Corn Exchange Bank*, 148 N. Y. 122; *Naser v. F. Nat. Bank*, 116 N. Y. 492; *Hatch v. F. Nat. Bank*, 147 N. Y. 184; *Dickerson v. Wason*, 47 N. Y. 439.) The plaintiff is a *bona fide* holder for value without notice. It is, therefore, unaffected by any equities existing in favor of antecedent parties to the instrument. (*Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553; *Brookman v. Metcalf*, 32 N. Y. 591; *Morse on Banking* [4th ed.], § 591; *Bank of Metropolis v. N. E. Bank*, 1 How. [U. S.] 234; *Wood v. B. Nat. Bank*, 129 Mass. 358; *Vickery v. S. S. Assn.*, 21 Fed. Rep. 773; *A. E. Nat. Bank v. Theunmiller*, 195 Ill. 90; *Wyman v. C. Nat. Bank*, 5 Colo. 30; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Brooks v. Sullivan*, 129 N. C. 190; *Charleston Bank v. Johnston*, 105 Tenn. 521; *Payne v. Zell*, 98 Va. 294.) As the plaintiff holds the legal title to the draft, and the defendants are the parties primarily liable thereupon, the latter cannot defend against their liability on the acceptance because of equities growing out of the relations of other par-

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ties to the instrument. (Daniel on Neg. Inst. [5th ed.] § 532; Edwards on Bills & Notes, 430, 431; 4 Am. & Eng. Ency. of Law [2d ed.], 470; Neg. Inst. Law, §§ 90, 112; *Williams v. Brown*, 2 Keyes, 486; *Paddon v. Williams*, 2 Abb. Pr. [N. S.] 88; *Freeman v. Falconer*, 13 J. & S. 383; *Amy v. Stein*, 16 J. & S. 512; *Tompkins v. Carner*, 27 N. Y. S. R. 264; *Carpenter v. Cummings*, 18 Misc. Rep. 587; *McKay v. Draper*, 27 N. Y. 256; *City Bank v. Perkins*, 29 N. Y. 554; *C. E. Bank v. F. Nat. Bank*, 118 N. Y. 443; *Castle v. C. E. Bank*, 148 N. Y. 122.)

Lemuel E. Quigg for respondents. Although the draft in suit was indorsed in blank the letter of Ives & Sons transmitting it to the Bank of America had all the effect, as between Ives and the bank, of an indorsement "For Collection." (2 Parsons on Prom. Notes, 20.) An indorsement "for collection and credit," or, as in this case, an indorsement in blank, accompanied by written instruction that it was for collection and credit, was, as between the parties, a restrictive indorsement, and constituted the bank simply the agent of Ives to present the paper, to obtain its acceptance and to demand payment of it when due, and, if paid, to credit the proceeds to Ives, but this authority, or any part of it could be at any time revoked. (1 Daniel on Neg. Inst. 552, 553; 2 Randolph on Com. Paper, 367, 368; *Dickerson v. Wason*, 47 N. Y. 439; *C. E. Bank v. F. Nat. Bank*, 118 N. Y. 443.) There was no consideration. (*Coddington v. Bay*, 20 Johns. 637; 5 Johns. Ch. 54; *Wardell v. Howell*, 9 Wend. 170; *Rosa v. Brotherson*, 10 Wend. 85; *Hart v. Palmer*, 12 Wend. 523; *Ontario Bank v. Worthington*, 12 Wend. 593; *Morton v. Rogers*, 14 Wend. 575; 12 Wend. 487; *Payne v. Cutler*, 13 Wend. 605; *Francia v. Joseph*, 3 Edw. Ch. 182; *Commercial Bank v. Norton*, 1 Hill, 501; *Manhattan Co. v. Reynolds*, 2 Hill, 140.)

O'BRIEN, J. The firm of J. F. Hasty & Sons of Detroit, drew their bill of exchange or draft, dated August 11, 1900,

and addressed to the defendants in their firm name of Waydell & Co. directing them, sixty days after date, to pay to the order of Ives & Son, the sum of \$1,500 value received, and to charge the same to the account of the drawers. Ives & Son were bankers in Detroit. Proof was given at the trial and a finding made by the court that the draft in question was delivered to the payees for the purpose of collection, although the indorsement was in blank. Ives & Son, the Detroit bankers, remitted the bill to the plaintiff with a general indorsement; but it was accompanied by a letter which stated that they inclosed for collection and credit Waydell & Co. \$1,500 no protest for non-acceptance. It appears that Ives & Son had an account with the plaintiff which had been running a number of years. They had borrowed from the plaintiff \$25,000 upon a collateral security note and agreement, which contained, in substance, the following stipulation: "The undersigned hereby agree to deposit with the said Bank such additional collateral security as the said Bank may from time to time demand; and also hereby give to the said Bank a lien for the amount of all the liabilities aforesaid upon all the property and securities at any time given unto or left in the possession of the said Bank by the undersigned. * * * The undersigned do hereby further authorize the said Bank, at its option, at any time, to appropriate and apply to the payment of any of the said liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of said Bank on deposit, or otherwise, to the credit of or belonging to the undersigned, whether the said liabilities are then due or not due." The plaintiff claims to be the owner of the draft by virtue of the indorsement to it and the stipulations contained in the collateral security note. When the plaintiff received the draft in question there was a large sum of money due to it from Ives & Son, the payees of the bill.

The plaintiff received the draft on or about August 15th, 1900. It was presented to the defendants, the drawees, for acceptance on the same day, and was duly accepted by them

in their firm name on the next day payable at plaintiff's bank. By the terms of the bill and the acceptance, which are general and absolute, the draft became payable on October 10th, 1900. After the acceptance and before it became due Ives & Son, to whom the draft had been delivered for collection, became insolvent, and before maturity of the bill notice was given to the plaintiff by the drawers revoking its authority to collect it and, also, to the defendants not to pay the same. It appears that the plaintiff never paid Ives & Son for the paper, nor either at the time when it received it, or any time thereafter, did the bank give to them any credit on the faith of the bill or its acceptance; nor did it release any prior or then existing obligation of Ives & Son; nor was any debt then or thereafter owing from Ives & Son in any way reduced, offset or discharged by its possession of the paper; nor did the bank make any entry whatsoever with respect to the draft, or its contents, as between it and Ives & Son; nor did it do any act other than to present it to the defendants for acceptance and hold it against the time when it should become due.

The facts stated constituted the plaintiff a mere collecting agent of the Detroit bankers who had remitted the draft, and as it received the paper in the character of a collecting agent only, it obtained no better title to it, or to the proceeds thereof, than the remitting bankers had; unless it became a purchaser for value without notice of any defect of title. The real owners of the bill were Hasty & Co. who drew it upon the defendants, by whom it was accepted. As the plaintiff never parted with anything, gave no credit, relinquished no security, or assumed any burden or responsibility on the faith of the paper, it could not, in commercial language, be treated as a *bona fide* holder of the paper or of the money represented by it.

Without inquiring as to what change, if any, has been effected by the recent statute in regard to commercial paper, it is enough to say that the plaintiff never appropriated the paper in any way, or its proceeds. As already stated, it paid nothing to Ives & Son, gave them no credit, made no entry or writing in their account, or did any other act importing a

consideration, and it had notice a month before the paper fell due and was distinctly advised that the Detroit bankers did not own it, but that the drawer did, and the recovery of the draft was demanded. There can be no doubt, we think, that under these circumstances the true owner of the paper had a right to recall it from the plaintiff, in whose possession it was for the purpose of collection. It is true that the paper came to the plaintiff's hands by general indorsement from Ives & Son, but the indorsement and the letter of advice in transmission must be read together, and so reading them the legal effect was to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement. It follows, therefore, that upon the facts found, and as to which there was little if any dispute, the plaintiff never acquired title to the bill. It was an agent merely for its collection. It was only in that character that Ives & Son received the paper from the drawer, and that was the only title that was conferred upon the plaintiff.

There are no elements in the case that can give to the plaintiff the character of a *bona fide* holder for value without notice. It had notice of the real situation before the paper fell due, and as it did not part with, or pay any valuable consideration, at the time it received the paper, or at any other time, it is in no worse situation, legally, than it was before it received it. This case rests upon rules and principles that are familiar. The cases and authorities that amply support the principles applicable to the case are very fully examined in the opinion of the learned court below, and it is not needful to make any further reference to them here. It would be only repeating and restating rules applicable to commercial paper that have been applied in this state ever since the case of *Coddington v. Bay* (20 Johns. 637).

We think the judgment is right and should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

BENJAMIN E. VALENTINE, Respondent, v. LONG ISLAND
RAILROAD COMPANY, Appellant.

COMMON CARRIER — WHEN RAILROAD COMPANY SUED FOR CONVERSION OF GOODS DELIVERED TO IT FOR TRANSPORTATION MAY SET UP ITS OWNERSHIP OF THE GOODS AS A DEFENSE. In an action against a common carrier to recover damages for the conversion of certain rails shipped over its lines, in which the defendant pleaded title to the rails and secured a verdict, assuming that the question of the availability of such a defense was raised on the trial, and that the Appellate Division had the right to consider it and reverse upon the ground that it was not available, the decision of that court must be regarded as erroneous where the defendant received the property for transportation in good faith, without knowledge that the rails were its property, and thereafter discovered that they belonged to it; and, therefore, there is no reason why it should not avail itself of such defense with the same force and effect that it could avail itself of the right of a true owner in case of a third person.

Valentine v. Long Island R. R. Co., 102 App. Div. 419, reversed.

(Submitted November 22, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 10, 1905, reversing a judgment in favor of defendant entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph F. Keany and *James W. Treadwell* for appellant. The objection of bailee's estoppel was not and is not available to plaintiff, not having been raised in any form in the pleadings or upon the trial. (*G. & W. Ry. Co. v. N. Y. C. R. R. Co.*, 163 N. Y. 228; *C. I. Co. v. Mayor, etc.*, 53 App. Div. 260; *Aeschlimann v. P. Hospital*, 165 N. Y. 296; *Megowan v. Peterson*, 173 N. Y. 1; *Robinson v. Hawley*, 45 App. Div. 287; *Schieck v. Donohue*, 92 App. Div. 330; *Roberge v. Winne*, 144 N. Y. 709; *Brady v. Nally*, 151 N. Y. 258; *Knapp v. Simon*, 96 N. Y. 284; *F. L. & T. Co. v. H. R. R. Co.*, 152 N. Y. 251.) Under

such circumstances as in the case at bar the carrier is not estopped from asserting its ownership. (*W. T. Co. v. Barber*, 56 N. Y. 544; *The Idaho*, 93 U. S. 575.) The agreement between Cheever and the defendant was a valid one, and the title to the rails in suit did not pass to plaintiff by the conveyance of the land from Cheever, notwithstanding plaintiff's ignorance of the agreement by which they were to retain their character as chattels. (*People ex rel. Muller v. Bd. of Assessors*, 93 N. Y. 308; *L. F. Co. v. L. G. Co.*, 82 N. Y. 476; *Ford v. Cobb*, 20 N. Y. 344; *Mott v. Palmer*, 1 N. Y. 564; *Tift v. Horton*, 53 N. Y. 377; *Wilcox v. Drought*, 36 Misc. Rep. 351.) Defendant did not lose its title to the part of the rails in question which had been taken up, and allowed to remain on the plaintiff's land for some years before the rest were removed. (*Heller v. Cohen*, 154 N. Y. 299; *Miller v. Warren*, 94 App. Div. 192; *Kelly v. Kelly*, 72 App. Div. 487.) The claim that defendant lost its title by abandonment is untenable. (*Adriance v. Roome*, 52 Barb. 399; *Bank of Attica v. P. & S. Co.*, 49 Hun, 606; *Miner v. Edison Co.*, 22 Misc. Rep. 543; *Nutting v. K. C. El. R. R. Co.*, 91 Hun, 251; *Cox v. Stokes*, 156 N. Y. 491.)

Benjamin E. Valentine, respondent, in person. Under the circumstances disclosed in this case, possession being one of the greatest advantages in a litigation over title, defendant had no right to take advantage of its agency as bailee to shift the onus or burden of proving ownership on plaintiff. (*Pulbian v. Brubiggan*, 81 Mo. 111; *Thompson v. Williams*, 30 Kan. 114; *Sedgwick v. Macy*, 24 App. Div. 1.) The trial court erred in adopting as conclusive — either on the point of original ownership of the rails or the alleged lending of the same to the syndicate — the testimony of the witness J. D. Cheever. (*Kavanaugh v. Wilson*, 70 N. Y. 177; *Elwood v. W. U. T. Co.*, 45 N. Y. 554.) The court erred in holding that the rails did not lose their character as personalty. (*L. F. Co. v. L. G., etc., Co.*, 82 N. Y. 476; *Prescott v. Wells*, 3 Nev. 82; *Shellan v. Shivers*, 171 Penn. St. 569; *Chandler*

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v. *Hamel*, 57 App. Div. 305; *McFadden v. Allen*, 134 N. Y. 489.) The trial court erred in refusing to recognize the title arising from the exclusive possession of the rails by the plaintiff for more than six years. (*Campbell v. Holt*, 115 U. S. 624.) Assuming such an oral agreement as claimed by J. D. Cheever had been made, and that it might have been effectual to permit defendant to remove the rails when the railroad "ceased to be used" in 1889, the defendants had abandoned the right to the rails by their laches for ten years, and the court's refusal to submit that question was error. (*Campbell v. Holt*, 115 U. S. 622.)

HAIGHT, J. This action was brought to recover the value of about one hundred and twenty tons of iron rails, fish-plates, bolts, spikes, etc., of which the plaintiff claimed to be the owner and which he alleged had been converted by the defendant. The evidence tended to show that in the latter part of the year 1899 the plaintiff applied to the station agent of the defendant at Woodsburg, near Cedarhurst, for cars and rate for shipping rails from that station to New York. The agent was unable to give the desired information, but subsequently obtained the rate and cars from a superior officer, and a few days thereafter the plaintiff loaded the cars and they were started for their place of destination. It is undisputed that the rails were never transported to New York or delivered to the plaintiff or his consignee, but the evidence is to the effect that the defendant subsequently ascertained that the rails belonged to it, and, therefore, they were sidetracked at Jamaica and the delivery to the plaintiff was refused. It further appears that the Ocean Point Company was the owner of an unimproved tract of land, and that for the purpose of developing the property the Rockaway Steeplechase Association was organized to operate a racecourse upon the grounds of the company, and that to facilitate its use as a racecourse a railroad was projected from Woodsburg station on the Long Island railroad to the grounds of the association; that one Cheever, a large owner of the stock of the company,

procured the right of way from the owners of land over which the proposed road was to be constructed, and then an agreement was entered into between the association and the defendant to the effect that the defendant was to loan the rails and ties necessary for the construction of the railroad to the association grounds and that the association was to pay for putting them down, the rails to remain the property of the defendant, and when they ceased to be used for railroad purposes the defendant could remove them at will. This agreement was carried out and the defendant occupied the railroad by running its cars over the same to the race track of the association during the spring, summer and fall meetings of the association until 1888, when the association's buildings were destroyed by fire, since which the premises have not been used as a racecourse. There is some evidence tending to show that thereafter the road was used for a time for the running of horse cars, but that after a time this was abandoned and the switch at the station on the main line of the defendant company was taken up. Thereupon the plaintiff, who, in the meantime, had procured a quitclaim deed from Cheever of the right of way and had acquired most of the stock of the Cedarhurst Company which had succeeded to the title of the lands of the association, applied to the defendant company to reinstate the switch at Woodsburg station so that freight consigned to the plaintiff could be run over the tracks to his premises. This, at first, was objected to on the ground that the bridge over the creek was not of sufficient strength to sustain the weight of the engine, but upon the offer of the plaintiff to draw the cars by horses from the main line over this railroad the defendant consented to restore the switch and did so; but shortly thereafter the representatives of the Wood estate, across whose premises the rails were laid, tore them up, thus preventing the use of the road for railroad purposes. This was in 1895. Subsequently, the tracks were taken up by the plaintiff and the rails shipped by the defendant to New York, as before stated.

At the conclusion of the evidence the defendant moved for

a direction of a verdict in its favor. The plaintiff objected and asked to go to the jury upon the following questions:

"1. As to whether there was an agreement on the part of the plaintiff's grantor that the defendant might remove said rails when the use of the railroad was discontinued.

"2. Whether or not, it appearing the use of said road was discontinued from 1888 to 1900, a period of twelve years, the defendant had abandoned said rails.

"3. On the question of the value of that portion of the shipment of said rails which the plaintiff had had at his own private residence for seven years."

Each of these requests was refused and exceptions were taken by the plaintiff. The court then directed a verdict in favor of the defendant.

As to the first request the evidence as to the agreement under which the rails were loaned by the defendant company to the association was by a former officer of the association, a disinterested person, and it is not controverted. As to the second and third requests, as we understand the plaintiff's testimony, the rails were upon the roadbed intact as late as 1895 when the plaintiff procured the switch at the Woodsburg station to be reinstated so that he could draw freight cars over the same. No act of abandonment is shown except the lapse of time. The conversion charged by the defendant was in 1899, less than five years from the time when the new switch was put in. We think, therefore, that there were no errors with reference to the rulings upon these questions.

The plaintiff now contends that the rails were part of the realty, and as such that the title passed to him under the quitclaim deed which he obtained from Cheever. Upon this question the evidence is very meager. He testified that he did not know that the railroad company furnished the rails or claimed them, but he does not state that he was a *bona fide* purchaser for value, or that he paid a dollar consideration for the deed. He had lived at Cedarhurst for twenty years, and was an officer and stockholder in that company. He must have known that the defendant operated the road upon which

these rails were laid up to that the buildings of the time the steeplechase association were burned. The fact that the defendant operated the road and that this branch was connected by switch with the main line was, we are inclined to think, such a notice to the plaintiff as ordinarily would suggest inquiry as to its rights and claims in the matter; but however that may be, the facts involved were not requested to be submitted to the jury, nor does the attention of the trial court appear, by the record, to have been called thereto, nor an exception taken, as it should have been in order to raise a question of law upon which a reversal of the judgment could be based.

We are thus brought to the consideration of the question upon which the Appellate Division has reversed the judgment. The defendant, as we have seen, is a common carrier sued for conversion of the rails which had been shipped over its line. It pleaded title to the goods, and a verdict was directed in its favor. The Appellate Division has reversed upon the ground, as stated in its opinion, that this plea was not available as a defense; but here again our examination of the record fails to disclose any motion, request or exception that raised this question upon the trial. The defendant was permitted not only to plead title without question, but to prove it upon the trial without having the attention of the court called to the question as to whether such a defense was available to the defendant. But assuming that the question was raised and that the Appellate Division had the right to consider it, we doubt the correctness of the conclusion reached with reference thereto. The rule undoubtedly is that a bailee cannot plead *jus tertii* against his bailor and that such rule applies to common carriers. (*The Idaho*, 93 U. S. 575.) The reason for the rule is that by such a plea the bailee or the common carrier might through the claim of some third person keep the property for himself. But there are a number of exceptions to this rule, as for instance where the property has been taken from the bailee by process of law, or where the title of the bailor had terminated, or where the bailor was an agent and the return of the property to him had

been forbidden by his principal, or where it appears that the plaintiff had obtained possession of the property feloniously or tortiously by felony, force or fraud and the property has been surrendered to the owner or the officers of the law, or where the true owner has demanded the same and the bailee has surrendered the property to him. (*Mullins v. Chickering*, 110 N. Y. 513, 514; *Shelbury v. Scotsford*, Yelv. 23; *Hardman v. Willcock*, 9 Bing. 382, 384; *King v. Richards*, 6 Wharton [Pa.] 418; *Bursley v. Hamilton*, 15 Pickering, 40; *Wright v. Pratt*, 31 Wis. 99; *Edmunds v. Hill*, 133 Mass. 445; Angell on Carriers, § 336; Story on Bailments, §§ 120, 266, 582, and authorities cited.) But the rule of *jus tertii* pertains to a right of property in third persons and is not this case. The reason that reference has been made to the rule applicable thereto is on account of the claim that the same rule should apply as between the bailor and bailee. In this case the plaintiff delivered the rails to the defendant for transportation to a place designated. The defendant received the goods and undertook to transport them for the plaintiff. Ordinarily it would be liable for breach of contract in case it failed to deliver the goods in accordance with the contract and would be estopped from interposing the plea of ownership, for it could not be permitted by failing to assert ownership at the time of shipment to obtain possession of the property and then assert title. But this rule has its exceptions and the exceptions are similar to those already discussed under the rule of *jus tertii*. If the defendant received the property for transportation in good faith without knowledge that it was its property and thereafter discovered that the property belonged to it, we see no reason why in an action for conversion it may not avail itself of the defense that the property belonged to it, with the same force and effect that it could have availed itself of the right of a true owner in case of a third person. It had the right to show that it was deceived by the plaintiff's claim of ownership when the property was tendered for transportation, and that by reason thereof it was excused from investigating the facts and asserting its ownership. The

defendant, however, is not permitted by this defense to shift the burden of proof. The plaintiff proves his cause of action by showing that he delivered the property to the defendant for transportation. The burden then was cast upon the defendant of showing that it received the goods in good faith under a mistake of fact as to the plaintiff's ownership, and that it was the true and paramount owner of the property.

The order of the Appellate Division should be reversed and the judgment of the trial court affirmed, with costs in all courts.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Ordered accordingly.

THOMAS F. LOUGHLIN, JR., by THOMAS F. LOUGHLIN, His Guardian ad Litem, Respondent, v. DANIEL S. BRASSIL, Appellant.

1. NEGLIGENCE—LIABILITY OF MASTER FOR DEFECTIVE MACHINE. Where in an action by an employee to recover damages for injuries received while using a machine, it appears that the accident resulted from a bolt dropping out of place by reason of the falling off of a nut; that this had happened on several prior occasions to the knowledge of the plaintiff; that the nut had been tightened on the morning of the accident; that the trial court charged that no recovery could stand against the defendant because he used a defective machine and that his only duty in respect thereto, so far as plaintiff was concerned, was to repair it, that is, to replace the bolt from time to time as it dropped out, it is reversible error to refuse to charge that before imposing any liability upon the defendant for failure to tighten the nut, the jury must find that the defendant had notice, or by reasonable care could have obtained knowledge that the nut had become loose again after being tightened in the morning.

2. EVIDENCE—IMPEACHMENT OF WITNESS. Statements alleged to have been made by a witness on several occasions after the accident, contradictory of his testimony on the trial, are improperly received in evidence where it appears that his attention had been called to these occasions in such a vague manner as to render it doubtful whether or not he understood which one of the occasions he was interrogated about, and hence no foundation was laid for their admission.

3. EVIDENCE OF REPAIRS TO MACHINE AFTER ACCIDENT INCOMPETENT. The reception of evidence that such witness had said after the accident "the press was now fixed all right" also constitutes error.

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4. EVIDENCE THAT WITNESS WAS NEARLY INJURED BY THE MACHINE WHICH INJURED PLAINTIFF INCOMPETENT. The reception of evidence that such witness had said "that he came near losing both of his hands in the morning," is erroneous where such evidence was not limited to proof that he had been caught, or had said that he had been nearly caught by the machine under the same circumstances alleged to have prevailed when plaintiff met his accident.

5. IMPROPRIETY OF REMARKS OF COUNSEL AS TO DEFENDANT'S INSURANCE AGAINST LIABILITY. Remarks of counsel in summing up, to the effect that there was "no evidence that he (the defendant) was insured, most of these people are," and again, "many people get insured, but there is no evidence of any such thing in this case at all," duly objected to, were entirely improper.

Loughlin v. Brassil, 102 App. Div. 617, reversed.

(Argued December 21, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 23, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The action was brought to recover for personal injuries alleged to have been received through defendant's negligence. The facts, so far as material, are stated in the opinion.

Thomas F. Magner for appellant. The defendant was guilty of no negligence, and the complaint should have been dismissed. (*Welsh v. Cornell*, 168 N. Y. 508; *Hogan v. Smith*, 125 N. Y. 774; *Yaw v. Wittmore*, 46 App. Div. 422; *O'Connor v. Hall*, 52 App. Div. 428; *Creagan v. Marston*, 126 N. Y. 568; *Hudson v. O. S. S. Co.*, 110 N. Y. 625; *Watts v. Beard*, 18 App. Div. 243; *Clark v. Ritter*, 39 App. Div. 598; *Fleet v. H. A. Co.*, 74 App. Div. 572; *Foster v. N. P. Co.*, 183 N. Y. 45.) The exceptions to remarks of counsel for plaintiff in summing up warrant a reversal. (*Mungold v. B. R. T. Co.*, 81 App. Div. 381; *Cosselmon v. Dunfee*, 172 N. Y. 507; *Wildrick v. Moore*, 66 Hun, 630.)

Melville J. France for respondent. No question of law is involved in the alleged error contained in the remarks of plaintiff's counsel. (*Cattano v. M. S. Ry. Co.*, 173 N. Y.

565; *Demon v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 356; *Cheseborough v. Conover*, 140 N. Y. 382.) No errors were committed in the admission of evidence. (*Furst v. R. R. Co.*, 72 N. Y. 543; *Homer v. Everett*, 91 N. Y. 641; *Kay v. M. S. Ry. Co.*, 163 N. Y. 447; *Burke v. B. C. M. Co.*, 98 App. Div. 219.) No error was committed in refusing the request to charge to which exception was taken. (*Fox v. Le Comte*, 2 App. Div. 61; *O'Flaherty v. N. E. R. R. Co.*, 34 App. Div. 74; *Keller v. N. Y. C. R. R. Co.*, 24 How. Pr. 172; *Carpenter v. Stillwell*, 11 N. Y. 61; *Hamilton v. Eno*, 81 N. Y. 116; *Doughty v. Hope*, 3 Den. 594; *Larkin v. W. M. Co.*, 45 App. Div. 6; *Reed v. McCord*, 160 N. Y. 330; *McGuire v. B. T. Co.*, 167 N. Y. 211.)

HISCOCK, J. Various errors were committed upon the trial of this case which require a reversal of the judgment appealed from.

The plaintiff, a young man of nineteen years, was injured while in the employ of defendant in a book binding establishment by having his hand caught in a press.

It will not be necessary to describe the press in more than a very general and brief way. It was a machine about six feet high, bolted to the floor. In its top was a die turned face downward. A movable part of the press moved up and down against this, a pitman rod being an important part of the machine which conveyed motion to the press. A wrought iron bolt, an inch and a half long, fastened with a half-inch nut, was employed in the machine in connection with the operation of the pitman rod, and it is claimed that upon the occasion of the accident the nut came off and the bolt dropped out of place, allowing the press improperly to take motion, whereby it unexpectedly came up and caught plaintiff's hand against the die as he was seeking to change it. There was evidence that the same thing had happened ten or twenty times before with this nut and bolt. The defendant gave testimony to the effect that the bolt had not dropped out either before or at the time of the accident, but of course

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this question must be regarded as having been settled in favor of the plaintiff.

It is urged upon the argument of this appeal by respondent, as I understand it, that the evidence that the nut had come off and that the bolt had dropped out upon prior occasions permitted the jury without other proof to find that the bolt was defective and out of repair. Except for the aid of these suggestions, it would seem difficult to determine upon what exact theory or in what particulars the learned trial court did permit the jury to find that the machine was defective. Outside of general observations quite pertinent to this as an action of negligence, the trial judge only instructed the jury as follows: "It is claimed by the plaintiff that this machine was defective, that it was defective at the time he was engaged upon it at the time the accident happened, that the master disregarded his duty in furnishing him with a machine which was reasonably safe and in making a reasonable inspection and keeping the machine in proper repair."

Assuming that the jury were told and understood that they might find a defect in the machine of the character now claimed, I think that the general application of this instruction was materially modified by further instruction subsequently given in response to defendant's request, and attention is particularly called to such subsequent instruction, because I regard it of importance in determining the correctness of certain still later refusals to charge in behalf of the defendant, of which complaint is now made.

The court charged: "By continuing in the employment of the defendant, after knowing that the bolt had come off ten or twenty times, the plaintiff assented to the use of a machine liable to such an accident, and the defendant was entitled to continue to use the machine as it was, and to repair it from time to time as such accident occurred, and no negligence may be imputed to the defendant from so continuing to use the machine." The words, "to repair it from time to time as such accident occurred," are shown by the context to refer to the accident of the bolt getting out of place. Thus, we have

it as the law of this case that no recovery can stand against the defendant because he used a defective machine and that his only duty in respect thereto, so far as the plaintiff was concerned, was to repair it, that is, replace the bolt from time to time as it dropped out. Under this rule, I do not see that any duty was left upon defendant in respect to the machine, except to use reasonable diligence and care in inspecting and keeping watch of it and in replacing the bolt when the nut dropped off.

With this interpretation in mind I pass to the refusals to charge, to which reference has been made. The requests were as follows :

(1) "Defendant's Counsel: The replacing of the nut on the screw was a detail of the work, and if one of the defendant's employees was negligent in replacing the nut, such negligence was the negligence of a fellow-servant, for which the defendant is not responsible."

(2) "Before the jury can impose any liability on the defendant for failure to tighten the nut, they must find that the defendant had notice, or by reasonable care could have obtained knowledge that the nut had become loose again after being tightened in the morning."

Under the law of the case as finally formulated by the trial judge, I am inclined to think that the first refusal was error; that the defendant, being entitled to use the machine as against the plaintiff subject only to an obligation to repair it by replacing the nut from time to time as it became loose, such repairing and replacing was a detail of the work which might be committed to an employee whose negligence would not make the employer liable. But, without stopping to consider at length whether this is so, it is quite clear that the second refusal did constitute error. Having the right to use the machine, the defendant could only be required to exercise reasonable care and prudence in detecting a loosening of the nut and in replacing the same, and the instruction should have been given as requested. It is suggested that this request assumes that the nut was tightened in the morning, and was

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improper in that respect. There was no question upon the trial that the nut was tightened in the morning, not only an employee of the defendant, but the plaintiff himself swearing to this. The request immediately preceding the one under consideration (not quoted) was expressly predicated upon a finding by the jury that the nut was properly tightened in the morning before the accident, and when the request in question was made I have no doubt that the defendant's counsel by the words "after being tightened in the morning" assumed, and must have been understood as referring to, a finding by the jury of that fact, as a basis for the rest of the request. The idea having been clearly incorporated in the request immediately preceding was to be implied and understood in interpreting his following language.

One of the defendant's employees, Byron, testified that he had tightened this nut in the morning before the accident and that after the accident the bolt and nut were in place. Plaintiff's counsel attempted to contradict this evidence and impeach the witness by showing that he had made conflicting statements after the accident and some of the objections and exceptions taken in the course of this evidence are well founded. One of the witnesses by whom plaintiff sought to prove contradictory statements was the mother of the plaintiff. She stated that this witness Byron "was at her house a couple of weeks after this accident happened," and then testified to various material contradictory statements made by him at that time. The specific objection was taken to one or more of these questions that no foundation had been laid for it and that it was incompetent.

The only testimony in which the attention of the witness appears to have been called to the time and place of these alleged impeaching statements is as follows: "I was twice to Mr. Loughlin's house, but I can't exactly say whether it was two weeks or was a week or three weeks after. I don't remember that I talked with Mrs. Loughlin about this accident, how it happened. I don't remember that I told her that morning that this came down, etc." It thus appears

that plaintiff's counsel in interrogating the witness about what he had said upon some "morning" as a foundation for what was to come, did not specify to which one of the two visits mentioned by witness he was referring as the occasion of the statements. In fact the words "that morning" are so indefinite as to make it difficult for us to say that they referred to the occasion of either of the visits mentioned by the witness, but assuming that they did refer to one of them, it was necessary that the witness should be made clearly and fairly to understand which one of the occasions he was being interrogated about, and the failure to do this gave just ground for the objection and exception afterwards taken and which have been stated. (*Hart v. Hudson River Bridge Co.*, 84 N. Y. 56, 60; *Rice v. Rice*, 43 App. Div. 458.)

This same witness, Mrs. Loughlin, over defendant's objection and exception, was allowed to testify that the witness Byron told her upon the same occasion "that the press was now fixed all right and that it would not fall or injure any one again, or * * * words to that effect." I think that this evidence was erroneous, independent of the difficulty just referred to, because it placed before the jury the fact that the machine had been fixed or repaired after the accident, and, of course, it is well settled that such evidence is incompetent. (*Dougan v. Champlain Trans. Co.*, 56 N. Y. 1, 8; *Clapper v. Town of Waterford*, 131 N. Y. 382, 389.)

It may be said that this testimony was proper as indirectly contradicting the statement of the witness upon his direct examination that the nut was not off from the bolt at the time of the accident or before that. I think, however, that such purpose is too remote to sustain this statement of fact otherwise incompetent and of a character to be very influential with the jury.

The same witness was allowed to testify that upon the same occasion defendant's witness said to her "that he came near losing both his hands in the morning." This evidence was certainly very material and of a character very prejudicial to the defendant. If in some manner it had been limited to

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saying that Byron had been caught, or had said that he had been nearly caught by the machine under the same circumstances alleged to have prevailed when plaintiff met his accident, the evidence might have been proper, but the record fails to show that any such limit was fairly placed upon it.

While plaintiff's counsel was summing up he said: "There is no evidence that he (the defendant) was insured, most of these people are. There is no evidence that there was anything of this kind here." The defendant's counsel excepted to this remark and asked that a juror be withdrawn, which application was denied by the court. Whereupon the plaintiff's counsel again said: "Many people get insured, but there is no evidence of any such thing in this case at all." The defendant's counsel again excepted to the remark, whereupon the court said: "There is no evidence and the jury will pay no attention to it." There can be no question, of course, but that these remarks were entirely improper, and that they were designed to influence the jury by considerations which were not legitimately before them. They were even more objectionable than is ordinarily the case, because where the defendant is a corporation it might make but little difference whether an insurance corporation was bound to indemnify it or not, whereas in the case of an individual defendant it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict. It can scarcely be said that the remark was one of thoughtlessness, because it was deliberately repeated in substance after counsel had objected to it. Under such circumstances the trial court would have been amply justified in correcting much more vigorously than it did the imprudence of counsel, and either the trial court or the Appellate Division would have been quite justified in reversing the judgment.

The judgment should be reversed and a new trial granted, with costs to abide event.

CULLEN, CH. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur.

Judgment reversed, etc.

EDWARD PRECHT, Individually, and as Executor of EVA FREUND, Deceased, Appellant, v. ELIZABETH S. HOWARD, Respondent.

1. LANDLORD AND TENANT—LEASE OF LAND FOR TERM OF YEARS AND RENEWALS THEREOF—OWNERSHIP OF BUILDINGS ON LAND AT EXPIRATION OF LAST TERM. Where an instrument in writing renewing for a third term a lease of land for a term of years, executed by the persons succeeding to the interests of the parties to the first and second leases, contained all of the covenants of the preceding leases relating to the renewal of the lease for a further term except one, which provided that the lessor should on the expiration of the term pay for a building erected on the land by the first lessee, in the event that no further lease should then be granted, but in lieu thereof provided that at the expiration of such term the lessee would peaceably and quietly surrender the premises to the said lessor, the said lessee has, at the expiration of said third term, no right to remove the building from the land, since by the omission of the covenant reserving the title to the building it became, by operation of law, a part of the land and the lessee lost any right of ownership that she or her predecessors in title might have had under the first and second leases.

2. SAME—WHEN LESSOR NOT ESTOPPED FROM ASSERTING TITLE TO BUILDINGS ON LEASED LAND BY EXTENSION OF OPTION TO RENEW LEASE. Where such lessor and the person who had succeeded to the rights of the lessee under such third lease entered into a contract, on the day before the expiration of the lease, which extended for a period of thirty days, the time within which the lessor should exercise her option either to grant a further lease for twenty-one years, or for the purchase of the house on the land, as provided by the terms of the then existing lease, "without prejudice of any rights to the parties hereto under the terms of said lease," and also provided that the lessor should have the right to re-enter the premises at the end of the extended period and, upon receiving from such lessee a conveyance of the building and a surrender of the lease, should pay such lessee a stipulated sum for the building, whereupon, and in conformity with such agreement, the lessee tendered to the lessor a conveyance of the building, which she declined to accept; the lessee cannot recover from the lessor the agreed price of the building, upon the ground that the execution of such agreement by the lessor led the lessee to waive her right to remove the building during the continuance of the term and that, therefore, the lessor is estopped from asserting her ownership of the building, since the mere extension for thirty days of the time within which the lessor might have exercised her option to give the lessee a new lease had no effect upon the ownership of the building, for

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that had been fixed by operation of law during the period of the preceding twenty-one years, especially where it is apparent from the terms of such agreement that the extension was granted under a radical misapprehension or misstatement of fact and where no new consideration, either pecuniary or obligatory, entered into the transaction.

Precht v. Howard, 110 App. Div. 680, affirmed.

(Argued December 21, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 15, 1906, in favor of defendant, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

Edward Miebling for appellant. The lessees of the lot were the owners of the building thereon, and had an absolute right to remove the same prior to the expiration of the lease. (*H. C. Assn. v. Houck*, 66 Hun, 205.) By entering into the negotiations which led up to the execution of the agreement under seal, upon which this action is brought, the plaintiff's decedent and assignors waived the right to remove the buildings standing upon the lot leased prior to the expiration of the term, and the defendant is, therefore, estopped from setting up a failure or want of consideration. (9 Cyc. 588; 17 Am. & Eng. Ency. of Law [2d ed.], 23.)

Lucius H. Beers for respondent. The house referred to in the agreement of October 30, 1899, was the property of the landlord. (*Loughran v. Ross*, 45 N. Y. 792; *Talbot v. Cruger*, 151 N. Y. 117; *Stevens v. Ely*, 162 N. Y. 79; *Hays v. Schultz*, 33 Misc. Rep. 137.) The tenant had no rights with respect to the house except such as the lease gave. (*H. C. Assn. v. Houck*, 66 Hun, 205; *Talbot v. Cruger*, 151 N. Y. 117.) There was no consideration for the agreement of October 30, 1899, so far as the respondent is concerned.

(*Snyder v. Guthrie*, 21 Hun, 341; *Cowles v. R. F. B. Co.*, 179 N. Y. 87.) The respondent is not estopped from asserting her ownership of the building. (*Organ v. Stewart*, 60 N. Y. 413; *Payne v. Burnham*, 62 N. Y. 69; *Winegar v. Fowler*, 82 N. Y. 315.)

WERNER, J. The controversy arises out of conflicting claims as to the ownership of a building erected by the plaintiff's predecessor upon lands that concededly belong to the defendant. The latter, as owner of the land, asserts title to the building, under the general rule that every structure permanently annexed to the soil is a part of the fee. The plaintiff stands upon the terms of an agreement in which the defendant agreed to purchase the building at a fixed price. As the legal effect of that agreement depends wholly upon the conditions under which it was made, a brief recital of the history that preceded its execution is indispensable.

In 1836, one Elizabeth Fish, who was then the owner of a parcel of land fronting upon Third street, in the city of New York, executed a lease thereof to one Robert Malcolm for a period of twenty-one years. This lease contained a provision to the effect that if the lessee, his executors, administrators or assigns should, within two years after its date, erect upon the premises a dwelling of certain described dimensions and specifications, which should be standing at the expiration of the term, the lessor should either pay to the lessee, his executors, administrators or assigns the value of the house, which was to be ascertained in a manner specified or grant a new lease for a further term of twenty-one years, to commence at the expiration of the first term.

Such a house was built by the original lessee and was upon the land in 1857, at the expiration of the first term. At that time the trustee of the original lessor, who was then deceased, executed a new lease to the same lessee for a further term of twenty-one years. This second lease contained a covenant for a further or third lease, if at the end of the second term there should be standing upon the land a house of the described

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dimensions and specifications, and this third lease was to contain all the covenants and conditions of the second lease, except the one relating to payment for the building in the event that no further lease should then be granted. The second lease, like the first, contained a provision for such payment if no third lease should be made.

When the second term was about to expire in 1878, one Eliza Rosenstein had become the owner of the leasehold estate, and the defendant had acquired title to the fee. Then a third lease was made between the defendant, as owner, and said Rosenstein, as tenant, for a further term of twenty-one years, which was to expire on the 31st day of October, 1899. This last lease contained no covenant for the purchase by the lessor of any building that might be upon the land at the close of the term, nor for the granting of any further lease, but in lieu thereof it provided "that on the last day of the said term hereby demised, or other sooner determination of the estate hereby granted, the said party of the second part, her executors, administrators or assigns, shall and will peaceably and quietly leave, surrender, yield up and deliver unto the said party of the first part, her heirs or assigns, all and singular, the said demised premises, with good and sufficient fence, without fraud or delay."

This was the situation on October 30th, 1899, when the defendant, and the plaintiff who had succeeded to the rights of the last lessee, entered into an agreement which recited, in substance, that the parties were desirous of extending for a period of thirty days the time within which the defendant should exercise her option either to grant a further lease for twenty-one years, or for the purchase of the house on the land, as provided by the terms of the then existing lease, "without prejudice of any rights to the parties hereto under the terms of said lease." This recital was followed by covenants that the defendant should have the right to re-enter the premises on the 1st day of November, 1899, and that the parties had agreed upon the sum of \$3,900 as the price of the building which the defendant was to pay upon receiving a

conveyance of the building and a surrender of the lease. The plaintiff seasonably tendered to the defendant a conveyance of the building, which she declined to accept, and this proceeding followed.

Upon the facts submitted, which are here presented only in their essential outlines, the learned Appellate Division directed judgment for the defendant and we concur in that conclusion. The case of *Howe's Cave Assn. v. Houck* (66 Hun, 205 ; *affd.* 141 N. Y. 606), relied upon by the appellant, is not at all like the case at bar. In the *Howe's Cave* case the lease was for a term of years, with an option for a continuance for another like term, and the buildings, which were there the subject of controversy, were expressly held to have been erected for purposes of trade. The litigation arose out of the tenant's effort to remove these trade buildings before the expiration of the extended term and his right to do so was affirmed by this court upon the ground that the term was in fact a continuous one, and that ordinarily a building erected by a tenant on demised premises for purposes of trade may be removed by him at the expiration of his term. (*Ombony v. Jones*, 19 N. Y. 234 ; *Holmes v. Tremper*, 20 Johns. 29 ; *Mott v. Palmer*, 1 N. Y. 570.)

The case at bar rests upon an entirely different principle. The dwelling house erected by the original lessee would at once have become a part of the freehold but for the provision of the first lease imposing upon the lessor the duty of paying for it at the end of the term if a new lease were not granted. That provision was continued in the second lease, but was omitted from the third or last lease. The omission from that instrument of the covenant reserving to the lessees their title to the building brought the parties within the operation of the general rule that buildings are a part of the land. These three leases were separate contracts, creating three distinct terms, and when the last lessee accepted a lease which contained no reservation as to the building, he lost any right of ownership therein that he or his predecessors in title may have had under the first and second leases. (*Loughran v. Ross*, 45

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N. Y. 792; *Talbot v. Cruger*, 151 N. Y. 117; *Stephens v. Ely*, 162 N. Y. 79.)

The effect of the agreement of October 30th, 1899, remains to be considered. The learned counsel for the appellant contends that the execution of this agreement by the defendant, led the plaintiff to waive his right to remove the building during the continuance of the term and that, therefore, the defendant is estopped from asserting her ownership of the building. The argument is inadmissible for it rests upon the erroneous premise that the plaintiff had the right to remove the building. He had no such right. The last lease contained no reservation as to the building in favor of the lessee and, since the structure had not been erected for purposes of trade, it became a part of the freehold in 1878 *eo instanti* when the last lease was executed. As the plaintiff had nothing to waive, and the legal status of the parties was not changed by the agreement of 1899, it follows that the defendant is not estopped from asserting that she was under no obligation to purchase what she already owned. (*Organ v. Stewart*, 60 N. Y. 413; *Payne v. Burnham*, 62 N. Y. 69; *Winegar v. Fowler*, 82 N. Y. 315.)

The mere extension for thirty days, of the time within which the defendant might have exercised her option to give the plaintiff a new lease, had no effect upon the ownership of the building, for that had been fixed by operation of law during the period of the preceding twenty-one years. It is fairly apparent, moreover, that this extension was granted under a radical misapprehension or misstatement of fact, for the recital of the agreement is to the effect that the time is extended either to grant a new lease for twenty-one years, or for the purchase of the house "*as is provided by the terms of the said lease.*" The lease referred to, that is the lease of 1878, contained no provision binding the defendant to grant a renewal or to purchase the house. The covenants of the agreement of 1899, therefore, did not change the legal rights of the parties. The defendant thereby acquired no rights and the plaintiff relinquished none. No new consideration, either

pecuniary or obligatory, entered into the transaction, and the contract has no support save in such moral elements as are beyond the jurisdiction of courts of justice.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE BROOKLYN COOPERAGE COMPANY, Appellant, Impleaded
with Another.

1. FOREST PRESERVE — SUFFICIENCY OF COMPLAINT IN ACTION TO RESTRAIN WASTE ON LANDS ACQUIRED BY CORNELL UNIVERSITY FOR A COLLEGE OF FORESTRY, UNDER CHAPTER 122, LAWS OF 1898. In an action by the state against a private corporation and Cornell University to enjoin a waste of lands acquired by such university under and subject to the provisions of chapter 122 of the Laws of 1898, which authorized the university to establish a department of forestry and provided for the purchase of lands for that purpose by the state, title to be taken by the university and held by it for thirty years, at the expiration of which period the lands should be conveyed to the state as part of the forest preserve, the complaint alleged in effect that the university acquired the lands in question, the purchase price therefor being paid by the state; that thereafter the university entered into a contract with the corporation for a term of years whereby the latter agreed to manufacture lumber cut on said lands by the university, to be furnished "as the company may give written notice that it shall require to be cut during the next following season;" that the university had thereafter abandoned its department of forestry, but that both parties continue and threaten to continue the performance of such contract, which will denude the lands of their forests, to the irreparable damage of the plaintiff, the relief demanded being that the validity of such statute and contract be determined, that an injunction issue restraining the defendants from cutting any timber upon such lands or removing any therefrom, and that the plaintiff be adjudged the equitable owner thereof, and as such entitled to the possession of the same. *Held*, that the complaint stated a cause of action.

2. CONSTITUTIONAL LAW — ACT NOT VIOLATIVE OF FOREST PRESERVE SECTION OF THE CONSTITUTION. A contention that the act is violative of section 7 of article 7 of the Constitution providing that "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.

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They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed," is without force, for the reason that the state has never been vested with the legal title and, therefore, the provision cited has no application.

3. ACT NOT VIOLATIVE OF CONSTITUTIONAL PROHIBITION AGAINST GIVING OR LOANING MONEY OR CREDIT OF THE STATE. Nor is the act violative of section 9 of article 8 of the Constitution prohibiting the giving or loaning of the credit or money of the state, etc.: since it is a public statute, the sole object of which is to promote education in the art of forestry, providing a perfect scheme of state control, and constituting the university, which is a non-sectarian educational institution, a subordinate governmental agency which undertakes to render services to the state in consideration of appropriations made.

People v. Brooklyn Cooperage Co., 114 App. Div. 723, affirmed.

(Argued December 19, 1906; decided January 8, 1907.)

APPEAL, by permission, from a judgment entered August 7, 1906, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the question certified are stated in the opinion.

Edward M. Shepard for appellant. The validity of the contract between the cooperage company and the university is to be determined as of the date — May 5, 1900 — when it was made. If it can be performed lawfully it will be held valid. (*Shedlinsky v. B. B. Co.*, 163 N. Y. 437; *Lorillard v. Clyde*, 86 N. Y. 384; *E. L. Co. v. S. B. Co.*, 54 App. Div. 518; *Cohen v. B. & J. E. Co.*, 9 App. Div. 425; *Guggenheimer v. Geiszler*, 81 N. Y. 292; *Rosenstein v. Fox*, 150 N. Y. 354; *White v. Benjamin*, 128 N. Y. 623; *De Groot v. Van Duzer*, 17 Wend. 170; *Dowley v. Schiffer*, 13 N. Y. Supp. 552; *Dunham v. H. P. Co.*, 57 App. Div. 426.) The act of 1898 was constitutional. (*Koch v. Mayor, etc.*, 152 N. Y. 72; *Fox v. M. & H. R. H. Society*, 165 N. Y. 517; *People v. N. Y. Society*, 161 N. Y. 233; *Trustees, etc., v. Roome*, 93 N. Y. 313.) The act of 1898 did not forbid — on

the contrary, it authorized — the university to make the contract of May, 1900. (*People v. Collins*, 19 Wend. 56; *People v. Denslow*, 1 Caines, 176; *Allen v. Blunt*, 3 Story, 742; *People ex rel. Wooster v. Maher*, 141 N. Y. 330; *People v. Broome*, 20 N. Y. Supp. 470; *Talcott v. City of Buffalo*, 125 N. Y. 280; *E. R. R. Co. v. City of Buffalo*, 96 App. Div. 458; *Hearst v. McClellan*, 102 App. Div. 336.) It was competent for the state to contract with Cornell University as a governmental agency under the act of 1898, in consideration of its performance of experimental and educational work, to pay the cost of land or of other necessary implements for experiments which should belong to the university. Payment by the state for land under such a contract was not more a gift than payment for tools or supplies to be used in such work would be a gift. (L. 1894, ch. 183; L. 1893, ch. 126; L. 1894, ch. 675.)

Julius M. Mayer, Attorney-General (*Edward B. Whitney* and *John G. Agar* of counsel), for respondent. The Brooklyn Cooperage Company never had any lawful rights in this property, for its contract with Cornell University was unauthorized by the statute, and was void as involving an unlawful delegation of power. (*Trustees, etc., v. Roome*, 93 N. Y. 313; *Fox v. M. & H. R. R. Co.*, 25 App. Div. 26; 165 N. Y. 517; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhan v. Sharp*, 27 N. Y. 611; *Presbyterian Church v. Mayor, etc.*, 5 Cow. 538; *B. E. S. R. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132; *People v. Squire*, 107 N. Y. 593; *Gale v. Village of Kalamazoo*, 23 Mich. 344; 116 N. Y. 181; *Matthews v. City of Alexandria*, 68 Mo. 115, 119; *Lord v. City of Onconto*, 47 Wis. 386.) Defendant's case must fail on account of the unconstitutionality of the statute of 1898. (*People v. Supervisors*, 52 N. Y. 556; *Poindexter v. Greenhow*, 114 U. S. 270; *Ex parte Siebold*, 100 U. S. 371; *Norton v. Shelby County*, 118 U. S. 425; *Huntington v. Worthen*, 120 U. S. 97; *Parkersburg v. Brown*, 106 U. S. 487.) The statute is not sustainable upon the theory of a grant to Cor-

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nell University as an independent educational institution. (*Fairbanks v. U. S.*, 181 U. S. 283; *Knight v. Shelton*, 134 Fed. Rep. 423; *Levin v. U. S.*, 128 Fed. Rep. 826; *People ex rel. Joyce v. Brundage*, 78 N. Y. 403; *People v. Allen*, 42 N. Y. 378; *Newell v. People*, 7 N. Y. 9.) The statute is not sustainable upon the alternative theory that the title to the college forest was put into Cornell University as a subordinate governmental agency. (*People v. Hawkins*, 157 N. Y. 1; *Hannah v. People*, 198 Ill. 77; 1 Story on Const. § 427; *People v. Suprs.*, 147 N. Y. 1; *Matter of Keymer*, 148 N. Y. 219.)

EDWARD T. BARTLETT, J. This appeal is allowed by the Appellate Division, and the following question certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

The defendant, Cornell University, was created a corporation under the Laws of 1865, chapter 585; section four reads in part as follows: "The leading object of the corporation hereby created shall be to teach such branches of learning as are related to agriculture and the mechanic arts, including military tactics; in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. But such other branches of science and knowledge may be embraced in the plan of instruction and investigation pertaining to the university as the trustees may deem useful and proper."

An act was passed in 1898 (Chap. 122) entitled "An act to promote education in forestry, to encourage and provide for the establishment of a college of forestry at Cornell University, and making an appropriation therefor." The act provides: "Section 1. Upon the acceptance by Cornell University of the provisions of this act, which acceptance in writing duly executed and acknowledged in the manner provided by law for the execution of written instruments by corporations, shall be filed in the office of the secretary of state within ten days after the approval of this act, the trustees of Cornell University are authorized and empowered to create and estab-

lish a department in said University to be known as and called the New York State College of Forestry for the purpose of education and instruction in the principles and practices of scientific forestry." "Section 2. For the purposes of such school and for carrying out the objects of this act, the board of trustees of said University are hereby authorized and empowered, by and with the consent and approval and under the direction of the forest preserve board of this state, to contract for the purchase of, and to purchase and to acquire by purchase title to not more than thirty thousand acres of land in the Adirondack forests. The University shall have the title, possession, management and control of such land, and by its board of trustees through the aforesaid College of Forestry shall conduct upon said land such experiments in forestry as it may deem most advantageous to the interests of the state and the advancement of the science of forestry, and may plant, raise, cut and sell timber at such times, of such species and quantities and in such manner, as it may deem best, with a view to obtaining and imparting knowledge concerning the scientific management and use of forests, their regulation and administration, the production, harvesting and reproduction of wood crops and earning a revenue therefrom, and to that end may constitute and appoint a faculty of such school, consisting of one director or professor, and two instructors, and may employ such forest manager, rangers and superintendents, and incur such other expenses in connection therewith as may be necessary for the proper management and conduct of said college and the care of said lands and for the purposes of this act, within the amount hereinafter appropriated." "Section 4. Every deed or conveyance of lands acquired under the provisions of this act by said University shall contain in the habendum clause thereof a condition and covenant that the same, and the title to the land conveyed therein and thereby, is taken by the grantee therein named, the Cornell University, under and pursuant to the provisions of this act; and shall also contain an express covenant running with the land and binding upon said Uni-

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versity, that the same is conveyed for the uses and purposes in this act provided for, and also an express covenant on the part of said University to convey said lands to the people of the state as hereinafter provided for. Every such conveyance shall be executed in duplicate, one of which shall be recorded in the office of the clerk of the county where the land is situated, and the other in the office of the secretary of state." Section 5 provides in detail for payment by the state of the consideration for the lands so contracted to be purchased. Section 6 and section 7, as amended in 1900 (Chap. 301), provide for the custody and expenditure of appropriations and proceeds from the sale of timber, the same being under state control. "Section 8. Subject only to the powers, duties and responsibilities vested in or imposed upon the trustees of Cornell University by this act, and except as may be inconsistent with this act and the objects and purposes herein provided for, the land so purchased shall be deemed to be and shall be regarded as a part of the forest preserve, so far as may be necessary for the protection of fish, game and forests as prescribed by the fish, game and forest law and the jurisdiction, supervision, powers, duties and responsibilities of the Fish, Game and Forest Commission, and of fish and game protectors and foresters, authorized by the Fish, Game and Forest Law, except as may be inconsistent with the provisions of this act, shall extend and apply to the land so purchased hereunder for the purposes of this act." Section 9 reads, in part, as follows: "Upon and at the expiration of thirty years from and after the taking effect of this act, all lands and each and every part and parcel thereof, purchased by said University, and paid for by the state under and pursuant to the provisions of this act, shall be by the board of trustees of said University, or its successors, granted and conveyed to the people of the state of New York by a good and sufficient deed of conveyance, without further price or consideration therefor, and the same shall thereupon be and become a part of the forest preserve."

The complaint alleges that the Brooklyn Cooperage Com-

pany and Cornell University are domestic corporations; that on or about December 21st, 1898, by its deed bearing date on that day, the Santa Clara Lumber Company conveyed to the defendant, Cornell University, about thirty thousand acres of land in the county of Franklin, state of New York, most of which was then covered with forests; a copy of said deed is annexed to the complaint and made a part of it; that the university shortly thereafter took possession of the lands so conveyed; that the deed was recorded in the office of the clerk of Franklin county and in the office of the secretary of state. The deed reads, in part, as follows: "And this conveyance is taken by the party of the second part upon condition that the same and the title to the land herein and hereby conveyed is taken by said party of the second part under and pursuant to the provisions of chapter 122 of the Laws of 1898, entitled 'An act to promote education in forestry, to encourage and provide for the establishment of a college of forestry at Cornell University, and making an appropriation therefor,' and the party of the second part covenants that this conveyance and the title to the land herein and hereby conveyed is taken by said party of the second part under and pursuant to the provisions of said chapter 122 of the Laws of 1898." Then follows a covenant that the land conveyed to the party of the second part is for the uses and purposes of the said act of 1898, and that the covenant shall run with the land. Following is a covenant that the university will convey to the state in thirty years from the taking effect of the said act of 1898 as therein provided.

It is further alleged that the university accepted the provisions of the act of 1898 (Chap. 122); that after acceptance, and prior to the conveyance, the trustees of the university had created and established a department therein known as and called the New York State College of Forestry, being the college referred to in the first section of chapter 122 of the Laws of 1898, for the purposes of education and instruction in the principles and practices of scientific forestry; and thereafter and also prior to said conveyance the board

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of trustees of said university for the purposes of such school and for carrying out the objects of said act, and with the consent and approval and under the direction of the forest preserve board of this state had contracted for the purchase of the land aforesaid. The remainder of the complaint reads as follows: "V. The sole consideration paid for the conveyance aforesaid (other than the considerations, if any, contained or implied in the conditions and covenants of the deed), was the sum of one hundred and sixty-five thousand dollars (\$165,000.00), which entire sum was paid to the Santa Clara Lumber Company by the Treasurer of the State of New York from moneys in the state treasury." The remainder of this section is not material at this time. "VI. Thereafter, and on or about May 5, 1900, the defendant, Cornell University, and the trustees of said University, entered into a written contract with the defendant, the Brooklyn Cooperage Company, a copy whereof is hereto annexed as a part of this complaint and marked 'Exhibit C.' Said company thereafter constructed one or more factories on or near said land and constructed a railroad through said land, and said University commenced to cut and deliver wood and timber to said company, and thereafter and for a long period and until the date hereinafter mentioned continued such cutting and delivery, thus clearing a portion of the land of its forests and only replanting a small fraction of the land so cleared, the rest remaining still denuded at the present time. At the time of making the contract it was the declared intention and expectation of the defendant, Cornell University, from year to year as the old timber standing on said tract should be removed and for the purpose of forestry education and experiment, to replant the said tract thus cleared in successive sections with seedlings. VII. The expense of cutting and delivering timber to the Brooklyn Cooperage Company under the terms of said contract in the practical operation proved to be so great that no profit was derived therefrom by Cornell University. No funds were provided by the University or otherwise for the planting or raising of trees on the land aforesaid

or for the conducting upon said land of any experiments in forestry or for the maintenance of the New York State College of Forestry, except out of certain appropriations made by the Legislature of this State, and said appropriations ceased in 1902. Thereafter, and in or about the month of June, 1903, Cornell University discontinued and abandoned the maintenance of said college, and since that date has planted nothing and made no attempt to conduct experiments of any kind upon the land aforesaid, but still remains in possession thereof. VIII. The defendant, Cornell University, has under the said contract been required by the defendant Cooperage Company to cut timber under the said contract and thereunder deliver the same to the said Cooperage Company, and in pursuance of such contract and notice the defendant, Cornell University, threatens to cut, remove and deliver, or if it shall not do so, the defendant Brooklyn Cooperage Company threatens to cut and remove large quantities of timber from said lands, the defendants claiming notwithstanding the facts aforesaid the right so to do under said contract 'Exhibit C.' IX. The effect of the actions and omissions aforesaid, if permitted, will be to denude said lands of their present forests and leave them either entirely denuded, or, so far as not denuded, occupied by a growth of vegetation of comparatively little value, and to do irreparable injury to the plaintiffs for which damages would not be adequate compensation, while the recovery of damages would involve a multiplicity of actions; and plaintiffs are advised and believe that the land belongs in equity to them, and desire an adjudication by this court of the equitable title thereto. Wherefore, plaintiffs submit to the court the question of the validity or invalidity of the statute and contract hereinbefore mentioned, and demand judgment enjoining and restricting the defendants from cutting any timber upon said land or removing any timber therefrom, and declaring and adjudging that plaintiffs are the equitable owners thereof and entitled as such to possession of the same, and for such other or further relief, or both, as may be just, together with the costs of this action."

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The contract between the cooperage company and the university is annexed to and made part of the complaint. It is necessary to read certain of its provisions in connection with the allegations of the complaint in order to determine whether the university, as agent of the state, has apparently exceeded its authority. The contract opens with the following recitations: "Whereas, the University has the right during the period of thirty years from the 21st day of December, 1898, and desires to cut, remove and dispose of such wood and timber located upon thirty thousand acres of land in Franklin county, New York (hereinafter called the College Forest), as the University deems desirable under proper forestry system, and also has the right during such period to lease the same, or any part thereof, for such purposes and upon such terms as to the University shall seem best; and, whereas, the company, with a view of utilizing such wood and timber and in order to enable the University to dispose of the same, proposes to place upon the College Forest two or more plants for the manufacture of staves and headings and the products of wood distillation." Subdivision first, the greater part of which is immaterial at this time, contains the following significant provision: "The company may produce and use electricity or other agents for fire, heating, lighting or telephone service for the use of its plants or for other uses of the College Forest, or for any use of any adjoining tracts, provided, however, that no such use shall be permitted which shall be inconsistent with the purposes for which the College Forest has been acquired by the University." The following sentence is found in subdivision second: "Subject to the conditions and exceptions hereinafter contained, the company shall have the right to take and use all the maple, beech and birch wood and timber of merchantable trees now upon the College Forest, and also such spruce and other soft woods as under proper forestry management it shall become proper to cut; but the University may in its discretion reserve all or any of the timber standing alongside of rivers, streams, etc." Subdivision eighth reads: "Nothing in this agreement shall be construed

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as limiting the University in the management of its property in any way, except so far as herein stated; and all reasonable rules and regulations for the safety of the property, and especially with regard to danger from fires, promulgated by the University or by the Forest, Fish and Game Commission, must be observed by the company, and the company especially agrees that no deleterious substances resulting in its operations shall be allowed to run into rivers or water courses or lakes."

These recitations and provisions clearly show that the cooperage company entered into the contract with full knowledge of the fact that the university represented the state under a restricted agency, and that the entire property involved was the college forest under the act of 1898. A person dealing with an agent whose powers are special and restricted, of which fact he has notice, contracts with him at his peril, and is bound by the provisions of the act of the legislature or written instrument from which he derives his authority.

The provisions of the contract above quoted, and others that are found in the instrument, disclose the fact that the university in making the contract was acting as the special agent of the state, and seeking to carry out, as the act of 1898 commanded, the advancement of the science of forestry, and to exercise in a proper manner its power to sell timber at such times, of such species and quantities in such manner as it deemed best, with a view to obtaining and imparting knowledge concerning the scientific management and uses of forests, their regulation and administration, the production, harvesting and reproduction of wood crops and earning a revenue therefrom.

The third subdivision of the contract reads, in part, as follows: "The company agrees to take and the University agrees to cut and deliver at its own expense, in each and every year of the term of fifteen years of this agreement, such quantities of wood in logs and cord wood *as the company may give written notice that it shall require to be cut during the*

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next following season, such notice to be given not later than the first day of July in each year, provided that the University shall not be obliged to cut in any one year more than one-fifteenth of the wood standing on the College Forest. Nor shall it be required in any one year, except as hereinafter provided, to cut less than ten thousand cords of fuel wood and retort wood, together with the logs produced in the cutting of such cord wood. At no time shall the University be obliged to cut and deliver a larger amount of logs than can be secured from the trees necessary to be cut in order to supply the quantities of cord wood required and taken by the Cooperage Company."

In this most important subdivision of the contract the company agrees to take and the university to deliver at its own expense, for a period of fifteen years, such amount of wood as the company shall give written notice it requires, provided the amount shall not exceed yearly more than one-fifteenth of the wood standing on the college forest.

It is argued by the counsel for the state that this provision of the contract amounts to a delegation by the university to the cooperage company of certain discretionary powers vested in the university to such an extent as to frustrate the objects of the New York State College of Forestry. We have here a covenant on the part of the university to cut and deliver at its own expense, in each and every year for the term of fifteen years, the life of the contract, such quantities of wood in logs and cord wood as the company may give written notice that it shall require to be cut during the next following season. The only limitation upon this absolute power of the company to dictate the amount of wood to be cut is the proviso that it shall not exceed one-fifteenth of the wood standing on this large tract of thirty thousand acres. The covenant in question is one that might be entered into by the absolute owner of forest property who is desirous of clearing the same by annual sales of timber. In the light of this sweeping covenant it is for the court to determine, after trial and a full knowledge of all the surrounding circumstances, its effect upon the rights of the parties.

The complaint alleges in this connection (subd. VI) that such cutting and delivery had the effect of "clearing a portion of the land of its forest and only replanting a small portion of the land so cleared, the rest remaining so denuded at the present time." Also (subd. VII) "that the expense of cutting and delivering timber to the Brooklyn Cooperage Company under the terms of said contract in the practical operation proved to be so great that no profit was derived therefrom by Cornell University." The complaint also alleges (subd. VIII) that the university has been given notice by the company to cut and deliver the wood required by the contract, and that the university threatens to comply with the notice; that the company also threatens to cut and remove large quantities of timber from the land if the university fails to comply with the notice. The complaint alleges (subd. IX) that the effect will be either to entirely denude the land, or if not denuded it will be occupied by a growth of little value, to the irreparable injury of plaintiff. We have here statements of what has been done and what is contemplated to be done.

We do not agree with the contention of the learned counsel for the cooperage company that our construction of this contract is to be determined as of the date when made, May 5th, 1900. We are undoubtedly called upon to determine its validity at that time, but we are also to consider the manner of its performance. There can be no doubt that subdivision third of the contract confers upon the company powers hostile to the general scheme of the act of 1898. The parties have attempted to perform this contract, and it is alleged that the state and the university abandoned performance several years since. We thus have presented the situation where the rights of the parties can only be properly protected by a trial in which all the facts bearing upon the controversy can be elicited and considered.

Our attention is called to the fact that the legislature, upon investigation, after several years of operation under the contract, condemned both present and prospective results and stated that in its opinion the existing contract which requires the total destruction of from five to eight hundred acres of

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forests every year should be abrogated. The court can doubtless take judicial notice of the statutes enacted and reports made by the legislature of this state, but as we are required to pass only upon the validity of the complaint, as aided by the documents forming a part of it, this rule has no application; this action of the legislature is not before us. Cornell University did not join in the demurrer, but is obviously interested in framing issues if a trial is to be had. We are of opinion that the complaint states facts sufficient to constitute a cause of action, and answer the question certified in the affirmative.

It remains to consider whether the act of 1898 (Chap. 122) is constitutional. The point is raised by the learned counsel representing the state. It was not passed upon by the courts below, but as counsel seemingly join in the request that the validity of the act be considered, we will examine the question. Its constitutionality is attacked on two grounds. The first ground is that it violates article VII, section 7, of the State Constitution, which reads as follows: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

The contention of the counsel for the state may be briefly summarized: That between the state and Cornell University the latter obtained a bare legal title from the Santa Clara Lumber Company; that the equitable title vested in the state; that the university received title for the purpose of undertaking certain educational work, either as an independent educational institution, or as the agent of the state; that the state in contemplation of law is the owner of the real estate involved; that when the state, through its agent, the university, contracted with the Brooklyn Cooperage Company for cutting and removing timber, it violated the section of the Constitution above quoted, as the owner of after-acquired property in the Forest Preserve as therein set forth; that

this contention is supported by the act of 1893 (Chap. 332) creating the Forest Preserve and Adirondack Park (§§ 100 and 120).

It is unnecessary to examine the question as to what extent the premises involved are a part of the forest preserve. The act of 1898 (Chap. 122, § 8) makes the premises a part of the forest preserve for certain purposes. We are, however, of opinion that as the state has never been vested with the legal title to the premises in question, the constitutional provision relied upon has no application.

The following is the second ground upon which the constitutionality of the act is attacked: It is argued that if the title to the premises is vested in Cornell University as an independent educational institution it would be an unconstitutional act, as it seeks to enable the state to do by that means what it cannot itself do and what the Constitution forbids it doing. The section of the Constitution said to be violated is article VIII, section 9, reading as follows: "Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section, shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes."

The counsel for the state also argues that the act is not sustainable upon the theory of a grant to Cornell University as a subordinate governmental agency. The learned counsel for defendant Cooperage Company contends that the state is dealing with Cornell University, not as an independent educational institution, but as a subordinate governmental agency; his argument is that the legislature has the power, through any agency it sees fit to select, other than one which is sectarian, to promote scientific or industrial experiments, or any cause of education, citing article IX, section 4, of the Constitution, which reads: "Neither the State nor any subdivision

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thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

It is argued there would be no meaning in this prohibition of sectarian appropriation for educational purposes if there were no power to make such appropriations in aid or maintenance of educational institutions which are not sectarian, when a consideration for such appropriations exists in work done by the institutions under contract obligations assumed to the state.

It is not contended that the Constitution contains any such general prohibition. We have here a public statute whose sole object is to promote education in the art of forestry; an object in which every citizen of the state has a vital interest, as the heavily wooded regions not only protect the sources of the rivers and lesser streams, but upon them primarily rests the industry of lumbering that is one of vast importance to a country whose forests are rapidly disappearing. The statute provides a perfect scheme of state control, constitutes the university its agent, requires frequent reports, and as amended in 1900 (Chap. 301) confers upon the comptroller additional powers of financial supervision. The power sought to be exercised by the state in the present instance is supported not only by judicial authority, but by many instances where its exercise has existed for years and remains unchallenged.

In *Trustees of Exempt Firemen's Benevolent Fund v. Roome* (93 N. Y. 313, 327), Judge FINCH uses this language: "When the state takes from the public treasury a sum of money and gives it to a corporate body for the relief of deserving beneficiaries it does one of two things. It either bestows a charity, or recognizes and discharges an obligation due from it to the recipients. The former it cannot do except in specified cases. The latter it may always do, for the constitutional provision was not intended and should not be con-

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strued to make impossible the performance of an honorable obligation, founded upon public service, invited by the state, adopted as its agency for doing its work * * *."

There could be no clearer statement of the general rule applicable to the case before us.

In *Fox v. Mohawk & Hudson River Humane Society* (165 N. Y. 517, at p. 523) under a very different state of facts, CULLEN, J., said: "The appropriation of public moneys for other than strictly governmental purposes and its expenditure through any other than official channels have been most carefully limited by article VIII of the Constitution." The learned judge then quotes section 9, already referred to in this opinion. At page 525 the opinion states: "Of course the state or any of its subdivisions may employ individuals or corporations to do work or render services for it." This case is reported below in 25 App. Div. 26. The late Judge LANDON wrote at page 32 as follows: "The government in the discharge of its duties must be the employer of various kinds of services or labor, from that of the common laborer to that of the expert in art and sciences; but the employment of such persons is, with possibly rare exceptions, committed by law to some officer or department. Within the restrictions imposed by the Constitution the state may dispense charity through the medium of the private charitable corporations selected by it. Such corporations or persons thus employed may, perhaps without inpropriety, be designated as 'subordinate governmental agencies.'" (See, also, *People ex rel. Bd. of Charities v. New York Society for the Prevention of Cruelty to Children*, 161 N. Y. 233, 239.)

The counsel for the defendant company has collected from the statute books a number of instances to show how uniformly it has been assumed that the Constitution permitted the acceptance of public moneys or public property by private corporations for educational or like purposes under contracts with the state to render certain services.

American Museum of Natural History; incorporated by Laws 1869, chap. 119; since that time the state has appro-

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priated \$3,250,000, which is in addition to amounts received from the city of New York. Lecture courses under the control of the museum were established by Laws of 1886, chapter 428, with an appropriation of \$18,000.

Metropolitan Museum of Art; incorporated by Laws 1870, chap. 197; appropriations by the state, including the year 1905, amounted to \$3,925,000.

New York Public Library, Astor, Lenox and Tilden Foundations; incorporated by Laws 1897, chap. 556. One of the most striking recent instances of a grant of public property to a private corporation in consideration of its performance of educational work is to be found in the legislation with respect to this corporation.

Appropriations to encourage agriculture; Laws 1894, chap. 398, amounted to \$30,000.

Farmers' Institute under auspices of New York State Agricultural Society; appropriating \$15,000; Laws 1894, chap. 358, p. 728.

New York Zoölogical Society; Laws 1902, chap. 441. This was a contract between the city of New York and the society, conceding to the latter the control of the New York aquarium at Battery park for its collection and creating an appropriation of public moneys "for furnishing opportunities for study, research and publications in connection with said collections."

Cornell University; numerous appropriations from the year 1890 to and including the year 1906, aggregating over a million dollars. Some of these appropriations were for a meteorological bureau, scholarships, agricultural experiments, veterinary college, the College of Forestry involved in this litigation and other purposes.

It is the policy of the state to foster non-sectarian education in various directions by selecting some corporation to act as its subordinate governmental agency, undertaking to render services to the state in consideration of appropriations made.

It follows that the act of 1898 (Chap. 122) is a valid exercise of legislative power, violating no provision of the Constitution.

The judgment of the Appellate Division affirming the

interlocutory judgment herein should be affirmed, with costs, with leave to the defendant, the Brooklyn Cooperage Company, to plead over on payment of costs in the courts below and in this court within twenty days after the service of a copy of the judgment of this court.

GRAY, O'BRIEN, WERNER and CHASE, JJ., concur; CULLEN, Ch. J., dissents from the result, but concurs in the conclusion of EDWARD T. BARTLETT, J., as to the constitutionality of the statute; HISCOCK, J., not sitting.

Judgment accordingly.

PATRICK W. CULLINAN, as State Commissioner of Excise, Respondent, v. CHARLES FURTHMAN et al., Appellants.

1. SPECIAL AGENTS OF STATE EXCISE COMMISSIONER — WHEN ACTING IN DISCHARGE OF THEIR DUTIES THEY ARE PUBLIC DETECTIVES — HOW THEIR TESTIMONY AS WITNESSES FOR THE STATE SHOULD BE CONSIDERED. The special agents appointed by the state commissioner of excise under section 10 of the Liquor Tax Law (L. 1896, ch. 112, as amd. by L. 1897, ch. 312, and L. 1903, ch. 486) for the purpose of investigating matters connected with the sale of liquors, and in cases of criminal violations of the statute to make verified complaints thereof, are detectives, but public and official detectives as distinguished from private detectives; they are public officers engaged in the performance of duties prescribed by statute, and should not be treated by the courts or juries as private detectives, or with the suspicion that is associated with mere spotters, paid informers, and those that are given compensation dependent upon certain results being obtained; neither should the relation of special agents to the case in which they are witnesses be wholly withdrawn from the consideration of the jury.

2. SAME — ERRONEOUS CHARGE AS TO THE WEIGHT TO BE GIVEN TO TESTIMONY OF SUCH SPECIAL AGENTS. Where, upon the trial of an action brought by the state commissioner of excise upon a bond, given pursuant to section 18 of the Liquor Tax Law, for a violation of the provisions thereof by selling liquor on Sunday, the evidence for the plaintiff consisted of the testimony of the two special agents who had made the complaint, the evidence for the defendants consisting only of denials by the saloonkeeper, and the trial court had properly charged, in effect, that the jury might find whether or not the credibility of the special agents as witnesses was affected by their zeal in the performance of their duty, and then to give effect and credit to their evidence according to such find-

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ing, it is reversible error to further charge, at the request of the plaintiff, to the effect that the special agents were witnesses in discharge of their duty and must not in any sense be treated as detectives, and that their testimony was entitled to the same weight as other disinterested witnesses, subject, of course, to the same tests as to its truthfulness, since such charge removed from the consideration of the jury the right to include in their tests of the truthfulness of the testimony of the agents, all consideration whatever of the agents' relation to the case and the manner in which they had obtained the information upon which their testimony was based.

3. SAME — ERRONEOUS CHARGE AS TO DUTIES OF SPECIAL AGENTS BASED UPON FACTS NOT ESTABLISHED BY EVIDENCE. It is reversible error also for the court to charge that the special agents were sent "for the purpose of ascertaining the truth apparently of rumors that had reached the department with reference to this man's place," where there was no evidence that rumors had reached the department concerning the saloonkeeper's place; certain reports had been made by the special agents, but there was no testimony relating to general rumors concerning the defendant's place of business.

Cullinan v. Furthman, 105 App. Div. 642, reversed.

(Argued December 14, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 16, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Abraham Gruber and *Henderson Peck* for appellants. The court erred in charging the jury that the special agents who testified in this case "must not in any sense be treated as detectives" and that "their testimony is entitled to the same weight as that of other disinterested witnesses." (*Cullinan v. Trolley Club*, 65 App. Div. 202; *Byrnes v. Matthews*, 12 N. Y. S. R. 81; *Lomer v. Meeker*, 25 N. Y. 361; *Decker v. Sexton*, 77 N. Y. S. R. 167; *Anon.*, 17 Abb. Pr. 48; *Schultz v. Schultz*, 83 App. Div. 375; *Moller v. Moller*, 115 N. Y. 466; *Matthews v. Moran*, 19 Misc. Rep. 24; *Rachen v. Morton*, 26 Misc. Rep. 842; *Hoes v. R. R. Co.*, 5 App. Div. 151;

Bratt v. Ano, 7 App. Div. 494.) The court further erred in telling the jury that these special agents went to the saloon in question for the purpose of ascertaining the truth apparently of rumors that had reached the department with reference to this man's place. (*Griffin v. White*, 32 App. Div. 630; *Sundheimer v. City of New York*, 176 N. Y. 497.)

Herbert H. Kellogg for respondent. None of the exceptions taken by the defendants were of any avail; the rulings of the trial justice upon the admission and exclusion of testimony were correct, and the charge was unexceptionable. (*Neil v. Thorn*, 88 N. Y. 270; *People ex rel. Phelps v. Oyer & Terminer*, 83 N. Y. 436; *Rheinfeldt v. Dahlman*, 19 Misc. Rep. 162; *Bank v. Slemmons*, 34 Ohio St. 142; *Bissel v. Starr*, 32 Mich. 297; *Bird v. Hudson*, 113 N. C. 203; *Vaughn Machine Co. v. Quintard*, 37 App. Div. 368; *Weymouth v. B., etc., R. R. Co.*, 2 Misc. Rep. 506; *Pendleton v. E. S. D. Co.*, 19 N. Y. 13; *Ankersmit v. Tuch*, 114 N. Y. 51.)

CHASE, J. This is an action upon a bond given pursuant to section 18 of the Liquor Tax Law (chapter 112, Laws of 1896, as amended by chapter 312, Laws of 1897, and chapter 486, Laws of 1903) by the defendant Furthman as principal, and the defendant company as surety.

The plaintiff alleges that the defendant Furthman violated the provisions of the bond by selling liquor on Sunday. On the trial the evidence of the plaintiff consisted of the testimony of two special agents of the state commissioner of excise, who testified that they went to the defendant Furthman's saloon on Sunday, September 11th, and found the side door open; that they entered the saloon and called for liquor, which they received, paid for and drank in the presence of the defendant Furthman.

The evidence of the defendants consisted of denials by the defendant Furthman. The issues were submitted to the jury and in the charge to them the court said:

"It is true that these men are agents of the Excise Depart.

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ment of the State. They, as you and I and counsel here, are engaged in the performance of public duties, and as such officers have a just and proper obligation imposed upon themselves, and are entitled to be justly and reasonably zealous in the performance of those duties. And so far as you shall find that those considerations impair or affect their credibility, if you find they do impair and affect it in any manner, why, to that extent, you are to subject them to that criticism. If, on the other hand, you find that their stories are reasonable and probable, and there is no reason to doubt their truthfulness, then you have a right to give effect and credit to the evidence which they have given."

The court also charged the jury that the defendant Furthman was an interested party and that they had the right to scrutinize his evidence. The charge relating to the agents and to the defendant was unobjectionable, but counsel for the plaintiff was not satisfied therewith, and asked the court to charge as follows :

"The special agents who testified in the case in behalf of the plaintiff were acting in the discharge of their duty, and they have no pecuniary interest whatever in the result of this action. They get nothing extra because they succeed in convincing the jury that they are telling the truth. They are here to do their duty and must not in any sense be treated as detectives. Their testimony is entitled to the same weight as that of other disinterested witnesses, subject of course, to the same tests as to its truthfulness."

The court so charged, and the defendants excepted. This charge was unobjectionable in part, but as a whole it was erroneous, because it removed from the consideration of the jury the right to include in their tests of the truthfulness of the testimony of the agents, all consideration whatever of the agents' relation to the case and the manner in which they had obtained the information upon which their testimony was based.

Special agents are appointed by the state commissioner of excise at a fixed salary, and are subject to removal by him.

Their duties are generally prescribed by statute. It is provided that special agents "Shall be deemed the confidential agents of the state commissioner, and shall, under the direction of the commissioner, and as required by him, investigate all matters relating to the collection of liquor taxes and penalties under this act and in relation to the compliance with law by persons engaged in the traffic in liquors. * * * He may investigate any other matters in connection with the sale of liquor and shall, under the direction of the state commissioner, make verified complaints of criminal violations of this act investigated by him, and forward the same to the state commissioner for examination, and if approved to be by him certified and forwarded to the district attorney for prosecution as provided in the case of other officers in section thirty-seven hereof." (Liquor Tax Law, sec. 10.)

In the practical work of the state department of excise one of the principal duties of special agents is to investigate violations of the Liquor Tax Law, and in doing so to secure the necessary evidence to establish such violations in actions or proceedings relating thereto or based thereon. In very many cases, as in the case now before us, the evidence is obtained by the agents personally requesting and obtaining liquor at a prohibited time. When liquors are sold to an agent at his request it does not make the person requesting the sale an accomplice in the transaction so as to require corroboration of his evidence as a matter of law to establish the fact, but an agent who in the manner I have stated investigates violations of the Liquor Tax Law under the direction of the state commissioner of excise cannot be said to be in no sense a detective. To detect is to uncover; to discover; to find out; to bring to light; as to detect a crime, or a criminal. (Webster's Dictionary.) To uncover; lay bare; expose; show. (Century Dictionary.) The duty of a special agent is to uncover, discover, find out, bring to light, violations of the Liquor Tax Law. A person who thus detects violations of the Liquor Tax Law is in a sense a detective. He is a public and official detective as distinguished from a private detective. A private

detective frequently gives testimony in a case where his compensation depends upon whether the person against whom the testimony is given is convicted or whether the party in the civil litigation for whom he testifies succeeds in the litigation.

Such a detective is materially interested in the result of the litigation, and his testimony should be scrutinized with care by the jury. Special agents are public officers engaged in the performance of duties prescribed by statute, and should not be treated by the courts or juries as private detectives, or with the suspicion that is associated with mere spotters, paid informers, and those that are given compensation dependent upon certain results being obtained. Neither should the relation of special agents to the case in which they are witnesses be wholly withdrawn from the consideration of the jury. Where a special agent whose duty it is to discover and establish the commission of crime, procures the sale of liquor to himself at a prohibited time for the purpose and with the intent of making a report of such violation to the commissioner of excise, and thereafter upon such report an action or proceeding is brought which depends for its successful termination upon the testimony of such agent, it is possible that the agent may become somewhat partisan, or biased in favor of the plaintiff and against the defendant to such an extent that consciously or unconsciously he will exaggerate the evidence against the accused and disregard or overlook the evidence that would tend in his favor.

While the success or failure of a particular action or proceeding does not affect the compensation to be paid to a special agent, yet special agents like other employees are desirous of obtaining and retaining the good opinion of their employer or superior officer and of making a record for ability and efficiency. The retention by special agents of their positions doubtless depends in a large degree upon the opinion which the commissioner of excise entertains of them and of the work performed by them.

Where the testimony of special agents is wholly uncontradicted and it is reasonable and probable, it is sufficient in a

civil action upon which to direct a verdict in accordance therewith. (*Cullinan v. Harley* [reported without opinion], 171 N. Y. 661.)

Where their testimony is contradicted, or it is unreasonable or improbable, the weight to be given to such testimony must be left to the jury. The court should not direct the jury that special agents "Must not in any sense be treated as detectives" nor that as a matter of law the testimony of special agents is entitled to the same weight as that of other disinterested witnesses. The relation of special agents to the case and their interest or prejudice therein, if any, should be left for the consideration of the jury on the facts appearing in each particular case.

The court also charged the jury that the special agents were sent "for the purpose of ascertaining the truth apparently of rumors that had reached the department with reference to this man's place." There was no evidence before the court that rumors had reached the department concerning Furthman's place. Certain reports had been made by the special agents but there was no testimony relating to general rumors concerning the defendant's place of business. We think this charge was erroneous.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ., concur.

Judgment reversed, etc.

FRED M. SHELLEY et al., as Executors of JOHN J. FAULKNER, Deceased, Respondents, v. FRANCIS A. CODY et al., Appellants, Impleaded with Others.

1. REAL PROPERTY — INTEREST. In an action to redeem real property and to have deeds and other conveyances under which defendant claimed title declared mortgages and for an accounting with respect to the use and occupation of the lands, the fact that the defendant went into possession wrongfully and as a mere trespasser, does not authorize the court to direct the computation of interest upon the yearly value of the use and

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occupation, upon the principle of annual rests, thus allowing compound interest.

2. TRESPASSER NOT ENTITLED TO CREDIT FOR IMPROVEMENTS. The defendant being in possession as a trespasser, having wrongfully ousted and expelled the true owner, the court, in its discretion, has the power to deny him credit for any improvements he may have made upon the property.

Faulkner v. Cody, 108 App. Div. 360, modified.

(Argued December 20, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 6, 1905, affirming a judgment in favor of plaintiffs entered upon the decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Smith M. Lindsley and *William S. Mackie* for appellants. It was inequitable for the court to exact from Cody a full and even large rental value for his occupation of the premises and at the same time refuse him any compensation whatever for the betterments and permanent improvements to the extent of upwards of two thousand dollars which he put upon the property. (*Williams v. Fitzhugh*, 37 N. Y. 452; *Rogers v. Rathbun*, 1 Johns. Ch. 367; *Tupper v. Powell*, 1 Johns. Ch. 439; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Fulton Bank v. Beach*, 1 Paige, 429; *Morgan v. Schermerhorn*, 1 Paige, 544.) Upon the findings of fact, the trial court erred in charging the defendant Cody with interest on the yearly rental value of the premises, computed with annual rests. (*State of Connecticut v. Jackson*, 1 Johns. Ch. 13; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Bennett v. Cook*, 2 Hun, 526; *Bell v. Mayor, etc.*, 10 Paige, 74.)

M. H. Powers and *George H. Weaver* for respondents. It was competent and a proper exercise of the equity powers of the court to charge Mr. Cody a yearly rental with interest

computed thereon at annual rests. (20 Am. & Eng. Ency. of Law [2d ed.], 1012; *French v. Kennedy*, 7 Barb. 452; *Jencks v. Alexander*, 11 Paige, 619; *Bennett v. Cook*, 5 T. & C. 134; *Lewis v. Duane*, 141 N. Y. 307.) Forcible entry and detainer is a bar to recovery for improvements. (*Scott v. Gurnsey*, 48 N. Y. 106; *Cosgriff v. Foss*, 152 N. Y. 104; *Clapp v. Nichols*, 31 App. Div. 531; *M. A. B. Church v. O. S. B. Church*, 73 N. Y. 82; *Howell v. Leavitt*, 95 N. Y. 617; *Mahony v. Bostwick*, 96 Cal. 53; 16 Am. & Eng. Ency. of Law [2d ed.], 119-121; *Compton v. Chelsea*, 139 N. Y. 541; *Phuris v. Geary*, 110 N. Y. 336.)

O'BRIEN, J. John J. Faulkner, the original plaintiff, brought this action against the defendant Francis A. Cody to procure the redemption of certain real property and to have the deeds and other conveyances, under which he claimed title and possession, declared to be mortgages merely, and also for an accounting with respect to rents and profits, or the use and occupation of the lands, while the defendant was in possession, as is alleged, wrongfully and forcibly. The unanimous affirmance in the court below has left but few questions for this court to consider, since the findings of the trial judge were very full and complete on the facts.

Two pieces of the real estate which the defendant occupied under claim of title, and which the plaintiff sought to recover, came to him through a deed and a mortgage from one Ransom. The consideration named in the deed was \$2,000, and the mortgage was for \$400. The claim of the plaintiff, fully sustained by the findings, is that Ransom held the property in such a way that he could redeem it at any time, and that the defendant knew at the time he took the deed and the assignment of the mortgage from Ransom that the plaintiff was the owner of the fee, and that he took it with the understanding that the plaintiff was to retain possession, and on paying certain amounts clear the title to all the property; that notwithstanding this agreement the defendant took forcible possession, with strong hand and multitude of people,

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and expelled the plaintiff from the premises. The transfer from Ransom to the defendant took place on the 23d of February, 1897. The defendant subsequently foreclosed the mortgage by advertisement and the premises covered by it, about eight acres, were sold to, or bid in by, the defendant for \$50. It was found by the trial court that this foreclosure was regular and the plaintiff was denied any relief with respect to the eight acres. The trial court directed an interlocutory judgment in favor of the plaintiff, in which substantially all the facts stated in the complaint were found in the plaintiff's favor.

There are three questions of law, arising upon the facts found as a basis for the interlocutory and final judgments, which the learned counsel for the defendant has presented and which we will consider.

It was found that the yearly value of the use and occupation of the premises was \$350, and directions were given that the accounting should be had upon that basis, charging the defendant with such use and occupation and crediting him with the amounts due on the securities he held. The referee was ordered to make a computation upon the principle of annual rests, which gave to the plaintiff the benefit of compound interest, although the total amount charged against the defendant in that respect is not very large, amounting, it is said, to less than \$100. The only basis for that rule was the fact found that the defendant went into possession of the premises wrongfully and as a mere trespasser; that we do not think authorized the direction in regard to the manner of stating the account and was a legal error for which the judgment should be corrected. A court of equity in adjusting the rights of the parties in such a case has some discretion which it may exercise in a proper case, as will appear from the following decisions. (*Thompson v. Hudson* L. R. [10 Eq. Cases] *497; *Davis v. May*, 19 Ves. Ch. 383; *Gordon v. Lewis*, 2 Sumner, 143; *Gibson v. Crehore*, 5 Pick. 146; *Bennett v. Cook*, 5 Sup. Ct. R. [T. & C.] 134; *Scheffelin v. Stewart*, 1 Johns. Ch. R. *620, 625; *Duffy v. Duncan*, 35 N. Y. 187; *In re Kernochan*, 104 N. Y. 618.) But the

facts found in this case do not take it out of the general rule for computing interest.

The \$350 found by the court as the value of the use and occupation to be charged against the defendant, should first be applied to the extinguishment of the accrued interest on the sums for the payment of which the defendant held the securities. The defendant was entitled as a matter of right to have this interest paid according to the terms of the instrument under which he held the possession and the method adopted for making the computation deprived him, to some extent, of that right. So that the principle of annual rests was, we think, improperly applied to the case. The fact that the defendant went into possession in the manner found by the court, while it justified the ruling that no compensation was to be made to him on account of his improvements, yet it did not, as it seems to us, justify the court in directing the computation to be made in such a way as to allow the plaintiff compound interest. The authorities on this question are rather obscure, but we are unable to find any clear authority for the direction of the court in this case.

After the defendant went into possession he made permanent improvements on the property. He built a barn that cost \$2,000, and made other improvements of a permanent and substantial character; but the trial court refused to allow him anything for these improvements. Its decision in that respect is based upon the ground that he was in possession as a trespasser, having wrongfully ousted and expelled the true owner. We think the court, in its discretion, had the power to deny to the defendant any credit for improvements made under such circumstances. It may be that it was a harsh rule to apply, but it was a discretion which a court of equity might exercise and this feature of the case does not, we think, present an error of law for which we should interfere with the judgment. (*Wood v. Wood*, 83 N. Y. 575; *Woodhull v. Rosenthal*, 61 N. Y. 396, 397; *Sedgwick on Damages* [8th ed.] § 903; *Jackson v. Loomis*, 4 Cow. 168.)

We think there was error committed also by the learned

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court below in the disposition which it made of the \$400 mortgage. This mortgage covered about eight acres of land and much of the land in question, it would appear, was of little value. The mortgage was made by the plaintiff and was accompanied by a bond and when it was assigned by Ransom to the defendant there was a covenant from the assignor that there was due thereon \$400 of principal and interest from March 13, 1893. The defendant took over the two securities, the deed and the mortgage, from Ransom and it is found that there was due \$1,600 on account of the Ransom indebtedness; but, as was stated in the memorandum at Special Term, it is not clear what portion of the \$1,600 was represented by the mortgage. The defendant foreclosed the mortgage by advertisement and bid in the land for \$50. This foreclosure, which the court held to be regular, did not cancel the bond, or pay the debt which the mortgage was given to secure. But in the statement of the account the defendant was charged with the full face of the mortgage and interest, instead of with the amount which the property brought at foreclosure sale. We think this was error and that he should have been allowed on the accounting the amount of the Ransom indebtedness, namely, \$1,600 less \$50, which was realized from the mortgage. The sale of the mortgaged premises was made under the provisions of the statute and it was a public sale. There is no finding that the defendant's bid did not fairly represent the value of the land.

The judgment should, therefore, be modified by crediting the defendant with \$1,600, the amount of the Ransom indebtedness, and charging him, not with \$400, the face of the mortgage and interest as was done, but with \$50, the amount which was realized on the foreclosure, and interest, and by recasting the interest in the usual way without making annual rests. As thus modified the judgment should be affirmed, without costs in this court to either party.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WEENER and CHASE, JJ., concur. HISCOCK, J., not sitting.

Judgment accordingly.

ARNOLD J. WEBB et al., Respondents, v. GERRIT S. SWEET et al., Appellants.

WILL—EQUITABLE CONVERSION—CONTINGENT REMAINDER. A testator directed his executor to invest \$1,500 in real estate for his niece, to be conveyed to her and held during her natural life, and after her death to the heirs of her body forever; the premises so to be purchased he gave, devised and bequeathed to the said niece during her natural life, and after her death "to the right heirs of her body forever;" the remainder of his estate he devised to his brother and his heirs forever; the testator died in 1885; the brother died intestate in 1892, leaving two sons, his only heirs at law; the niece died intestate in 1902 without issue, leaving a brother and sister her only heirs at law; at the time of her death the \$1,500 had not been invested as directed, but remained in the hands of a trustee appointed to succeed testator's executor. *Held*, that the testator having died before the enactment of the Real Property Law (L. 1896, ch. 547) the will must be interpreted according to the provisions of the Revised Statutes (1 R. S. 722, § 8; 725, § 28; 748, § 2); that the direction to invest operated as an equitable conversion of the fund into real property, and that it should be disposed of as if the investment had in fact been made; that the intent of the testator was to give his niece a life estate only in the real property to be purchased with said fund; that upon her death the title thereto vested in the heirs at law of testator's brother, and not in the heirs at law of testator's niece.

Webb v. Sweet, 109 App. Div. 911, affirmed.

(Argued December 7, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 11, 1905, in favor of plaintiffs, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

One Arnold Webb died leaving a will which has been duly admitted to probate. By his will he gave certain specific and general legacies and made certain bequests, and he also provided as follows: "*Fifth*. I hereby direct my executor hereinafter named to pay out, expend and invest one thousand five hundred dollars in the purchase of real estate to be selected by him in his discretion and best judgment for my niece, Emily Sweet, and to be conveyed to the said Emily Sweet to

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be held by her during the term of her natural life, and after her death to the heirs of her body forever, which said premises so to be purchased as aforesaid, I hereby give, devise and bequeath to the said Emily Sweet for and during her natural life and after her death to the right heirs of her body forever."

He gave, devised and bequeathed the rest, residue and remainder of his estate by a provision in his will as follows: "*Sixteenth.* I give, devise and bequeath all the rest, residue and remainder of my estate and effects, real and personal, not herein otherwise disposed of after payment of my debts, legacies and funeral charges, to my brother Reuben G. Webb of the City of Davenport in the state of Iowa, and his heirs forever (including my gold watch), with my earnest request that in case of the above-named legatees or devisees should from any unforeseen accident come to want he will provide for them and make them as comfortable as possible and as he, in his judgment, thinks proper."

Said Emily Sweet survived the testator and died intestate without descendant, never having had a child. She left her surviving the defendants Sweet and Lane, her brother and sister, her only heirs at law. Said Reuben G. Webb survived the testator and died intestate leaving him surviving the plaintiffs, his two sons, his only heirs at law. The defendant Parker is the duly appointed trustee under said will, and he has in his hands as such trustee \$1,500 subject to investment as provided by the fifth paragraph of said will, but it has not been so invested, and it remains in his hands with some accumulated interest thereon. Such fund of \$1,500 and accrued interest is claimed by the plaintiffs and also by the defendants Sweet and Lane, and the question in difference between them was submitted to the Appellate Division upon an agreed statement of facts, and said court rendered judgment in favor of the plaintiffs and against the defendants, declaring that the plaintiffs are the owners of and entitled to said fund and directing the defendant trustee to pay the same to the plaintiffs, less his legal fees as such trustee. The defendants Sweet and Lane have appealed to this court.

S. C. Huntington for appellants. Emily Sweet having survived the testator, her estate is a fee simple absolute and the defendants are absolutely entitled to the fund. (1 R. S. 748, § 2; *Lytle v. Beveridge*, 58 N. Y. 592; *Terry v. Dayton*, 31 Barb. 519; *Wilkes v. Lion*, 2 Cow. 333; *Patterson v. Ellis*, 11 Wend. 259; *Barber v. Cary*, 11 N. Y. 401; *Barlow v. Barlow*, 2 N. Y. 386; *Brown v. Lyons*, 6 N. Y. 420; *Post v. Post*, 47 Barb. 89; *Metcalfe v. U. T. Co.*, 181 N. Y. 39; *Rivard v. Gisenhof*, 35 Hun, 247.)

Henry Purcell for respondents. The residuary clause operated to carry with it all property interests that were otherwise undisposed of including all bequests and devises that for any reason lapsed or failed because of invalid disposition or other accident. (*Matter of Bonnet*, 113 N. Y. 522; *Riker v. Cornwall*, 113 N. Y. 115; *Floyd v. Carew*, 88 N. Y. 560; *Matter of Miner*, 146 N. Y. 121; *Lamb v. Lamb*, 131 N. Y. 227; *Morton v. Woodbury*, 153 N. Y. 243.) As there were no heirs born to Emily Sweet the remainder was undisposed of and under the residuary clause it passed to the plaintiffs as heirs at law of the residuary devisee. (*Brown v. Wadsworth*, 165 N. Y. 225; *Shader v. Powers*, 56 Hun, 155; *Manice v. Manice*, 43 N. Y. 304; *Tompkins v. Ver Plank*, 10 App. Div. 579; *Clark v. Cammann*, 160 N. Y. 316; *McGillis v. McGillis*, 154 N. Y. 533; *Hall v. L. F. E. Co.*, 158 N. Y. 570.)

CHASE, J. The testator died prior to the enactment of the Real Property Law (Chapter 547 of 1896) and the will must be interpreted in recognition of and obedience to the provisions of part 2, chapter 1, title 2, article 1 of the Revised Statutes. It is provided by section 3 of said article that:

“All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall hereafter be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.”

It is also provided by section 28 of said article that "Where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate, in the same premises, shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them."

The plaintiffs claim that Emily Sweet took a life estate in said property and that upon her death without heirs of her body the contingent remainder became vested in them as the heirs at law of said residuary legatee. The defendants Sweet and Lane claim that under said section 3 of the Revised Statutes said Emily Sweet took a fee simple absolute in said property and that upon her death it descended to them as her heirs at law. Was the will correctly construed in rendering judgment in favor of the plaintiffs?

It is not questioned here, but that the unqualified direction of the testator to invest the fund of \$1,500 in real property in the manner stated, operated as an equitable conversion of the fund into real property and that it should be disposed of as if the investment had in fact been made.

We first look to the will to ascertain the testator's intention and have no difficulty in concluding that the testator intended to limit the devise to Emily Sweet to her life. It is so expressed by him in clear and unmistakable words. Subject to such life estate he intended that the real property purchased with said \$1,500 should vest in her descendants, if she left descendants. There is nothing in the will to justify the contention of the defendants that the testator intended that the real property to be purchased with said \$1,500 should remain in the Sweet family. The sixteenth paragraph of the will which gives to plaintiffs' father the rest, residue and remainder of the testator's estate is full, clear and sufficient as a devise to him of the remainder in said real estate contingent upon said Emily Sweet dying without leaving heirs of her body. (*Matter of Bonnet*, 113 N. Y. 522; *Riker v. Cornell*, 113 N. Y. 115; *Floyd v. Carow*, 88 N. Y. 560; *Mat-*

ter of Miner, 146 N. Y. 121; *Lamb v. Lamb*, 131 N. Y. 227; *Morton v. Woodbury*, 153 N. Y. 243; *Moffett v. Elmendorf*, 152 N. Y. 475.)

Emily Sweet having died without heirs of her body, the judgment of the court below would seem to be right, unless the provisions of the Revised Statutes relating to the creation and division of estates require a different determination.

Chapter 2 of the Laws of 1782 declares, "That in all cases wherein any person or persons would if this law had not been made had been seized in fee tail of any lands, tenelements, hereditaments, such person or persons shall in future be deemed to be seized of the same in fee simple." That act was superseded by chapter 12 of the Laws of 1786 (Vol. 1, Revised Laws, 52), which in terms abolished all estates tail, and substantially re-enacted the provisions of the former act declaring that a person that would prior to that act take an estate tail shall be deemed to be seized of the same in fee simple absolute. This act was repealed when the Revised Statutes were enacted. Notwithstanding estates tail were abolished, the celebrated rule in *Shelley's Case* (1 Coke, 104) remained in force so far as it was unaffected by said acts until the enactment of said section 28 of the Revised Statutes. The revisers advised the abolition of the rule in *Shelley's case* as being one "purely arbitrary and technical and calculated to defeat the intention of those who are ignorant of technical language." The rule in *Shelley's case* was in substance that, "When the ancestor by any gift or conveyance takes an estate of freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase." (*Brown v. Lyon*, 6 N. Y. 419.) The rule in *Shelley's case* was a rule of law and not a rule of construction, and when a case came within its terms it was applied with all its arbitrary and technical severity. It was held in many cases to apply notwithstanding the will by express terms limited the gift to the first taker to an estate for life.

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The enactment of said section 28 of the Revised Statutes not only abolished the rule in *Shelley's* case, but it settled in the negative any further claim that a testator's intention to limit a gift or devise to a person for life could not be carried out where a remainder is limited to the *heirs or heirs of the body* of a person to whom a life estate in the same premises is given.

The courts have recognized a construction of these sections of the statute so as to give effect to the intention of the testator in *Barber v. Cary* (11 N. Y. 397, 401); *Moore v. Littel* (40 Barb. 488, 495); *Barlow v. Barlow* (2 N. Y. 386); *Hall v. La France Fire Engine Co.* (158 N. Y. 570) and other cases.

That it was the intention of the Revised Statutes to have the courts first give effect, so far as possible, to the intent of the parties to all instruments affecting real property is further shown by section 2 of title 5 of chapter 1 of part 2 of the Revised Statutes, which provides as follows: "In the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice, to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law."

We are of the opinion that the intent of the testator, as collected from the whole will, was to give Emily Sweet a life estate only in the real property to be purchased with said fund, and that such intent so expressed in said will is consistent with the rules of law.

The plaintiffs, therefore, became vested with the title to said fund upon the death of said Emily Sweet. The judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT and WILLARD BARTLETT, JJ., concur; HAIGHT and VANN, JJ., absent.

Judgment affirmed.

TRUST COMPANY OF AMERICA, as Committee of ALPHONSE J. STEPHANI, Respondent, v. THE STATE SAFE DEPOSIT COMPANY, Appellant.

1. **INSANE — APPOINTMENT OF COMMITTEE FOR INSANE LIFE CONVICT.** Under the provisions of chapter 401 of the Laws of 1889 the Supreme Court has jurisdiction, upon the application of the persons mentioned therein, to entertain proceedings and direct the appointment of a committee of the estate of a life convict, although the convict before the commencement of the proceedings had become insane and had been transferred to a state hospital for insane convicts; the statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced, whether the convict should thereafter become insane or not and was not repealed by the enactment in 1895 of section 2323a of the Code of Civil Procedure, providing for the appointment of a committee upon the application of a state officer having special jurisdiction over the institution or by the superintendent thereof, "where an incompetent person has been committed to a state institution in any manner provided by law and is an inmate thereof."

2. **APPOINTMENT OF COMMITTEE CANNOT BE ATTACKED COLLATERALLY IN ACTION TO RECOVER CONVICT'S ESTATE.** Objections that the petition for the appointment of the committee failed to state the age of the petitioner or of any other parties, or whether they or any of them were incompetent cannot be raised by demurrer in an action by the committee to recover the convict's estate, the proceedings having been in a court of general jurisdiction and therefore are not open to a collateral attack in such an action.

Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, affirmed.

(Argued December 7, 1906; decided January 15, 1907.)

APPEAL from a final judgment entered February 16, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The action was brought by the Trust Company of America as committee of the estate of Alphonse J. Stephani, a convicted person sentenced to the state prison for life, to recover from the defendant certain stocks, bonds, cash and other per-

sonal property belonging to said life convict and alleged to have been deposited by him in a safe deposit box in the vaults of the defendant corporation. The complaint alleged the appointment of the plaintiff as committee of the estate of the said Alphose J. Stephani under provisions of chapter 401 of the Laws of 1889. The defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground that the plaintiff did not have legal capacity to sue, for the reason that it did not appear that the plaintiff was ever legally appointed committee of the property of Alphonse J. Stephani, the life convict aforesaid. Upon the trial of the demurrer an interlocutory judgment was rendered in favor of the plaintiff, giving leave, however, to the defendant to withdraw the demurrer and answer within twenty days upon payment of costs, and providing for the entry of final judgment in favor of the plaintiff in case of a failure to avail itself of such leave.

The interlocutory judgment was affirmed upon appeal to the Appellate Division. The defendant failed to interpose any answer, and final judgment was thereupon rendered against the defendant, from which final judgment the present appeal was taken.

George A. Strong for appellant. The application for the appointment should have been made under section 2323a of the Code of Civil Procedure. (*Tonnele v. Hall*, 4 N. Y. 140; *Reno v. Pinder*, 20 N. Y. 293; *People v. N. Y., etc., Ry. Co.*, 84 N. Y. 565; *People ex rel. v. Spicer*, 99 N. Y. 225; *Matter of Tilyou*, 57 App. Div. 101; *Heckman v. Pinkney*, 81 N. Y. 211; *People v. G., etc., Co.*, 98 N. Y. 67; *Wood v. Bd. of Suprs.*, 136 N. Y. 403; *Stuck v. City of Brooklyn*, 150 N. Y. 335; *L. S., etc., Ry. Co. v. Roach*, 80 N. Y. 339; *Fire Dept. v. A., etc., Co.*, 106 N. Y. 566; *DeLafield v. Brady*, 108 N. Y. 524.) Even under chapter 410 of the Laws of 1889 the appointment of the committee was illegal and void for the reason that the provisions of this statute were in no way observed. There are radical defects in the procedure.

(*Matter of Henderson*, 157 N. Y. 423; *Matter of Stephani*, 75 Hun, 188; *Roberts v. S. S. D. Co.*, 123 N. Y. 57.)

Carl A. Hansmann for respondent. The appointment was made under the proper statute. (*Matter of Walker*, 57 App. Div. 1; *Matter of Russell*, 1 Barb. Ch. 38; *Avery v. Everett*, 110 N. Y. 317; *Matter of Williams*, 24 App. Div. 247; *Matter of Blewitt*, 131 N. Y. 546.) Chapter 401, Laws of 1889, was the proper statute under which to proceed for the appointment of a committee. (*Avery v. Everett*, 110 N. Y. 317; *Steinhardt v. Baker*, 163 N. Y. 410.) The proceedings resulting in the order appointing the committee were in all respects regular and valid. (*Matter of Henderson*, 157 N. Y. 423; *McAndrew v. Radway*, 34 N. Y. 511; *Jones v. Jones*, 137 N. Y. 613; *Wheeler v. Scully*, 50 N. Y. 667; *Gardner v. Gardner*, 22 Wend. 526; *DeLafield v. Parish*, 25 N. Y. 9; *Matter of Bischoff*, 80 App. Div. 386; *Matter of Blewitt*, 131 N. Y. 546; *People v. Liscomb*, 60 N. Y. 559; *Ferguson v. Crawford*, 86 N. Y. 609.)

WILLARD BARTLETT, J. The special proceeding which resulted in the appointment of the plaintiff corporation as committee of the estate of Alphonse J. Stephani, a life convict, was instituted and carried to a conclusion under chapter 401 of the Laws of 1889, which is entitled "An act to provide for the care and custody of the estates of persons when sentenced to State prison for life."

The question raised by the demurrer to the complaint, and which we are required to determine upon this appeal, is whether the Supreme Court in New York county, which made the final order appointing the committee, had jurisdiction to entertain the proceeding and make such order under the circumstances set out in the complaint, pursuant to the provisions of the statute cited. In behalf of the appellant it is asserted that the Supreme Court had no such jurisdiction, and that the respondent's appointment as committee should have been made under title VI of chapter 17 of the Code of

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Civil Procedure, and particularly under section 2323a in that title. This proposition is based upon the fact that Stephani, after he had served about twelve years of his life sentence in the state prison at Sing Sing, had been transferred to the Dannemora State Hospital for Insane Convicts, under the provisions of chapter 520 of the Laws of 1899, and that he was in said hospital when the special proceeding was instituted for the appointment of the plaintiff as committee of his estate.

Copies of all the papers in that special proceeding are annexed to and form a part of the complaint in the present action. Those papers show a substantial compliance with all the requirements of the act of 1889 relative to the care and custody of the estates of persons sentenced to state prison for life. The act provides that whenever any convict has been sentenced to imprisonment in this state for life, the husband, wife, relatives, next of kin, or any creditor of such person, may apply for the appointment of a committee of his estate, both real and personal, at a Special Term of the Supreme Court held in the judicial district in which the person resided at the time of his conviction. This application was made at a Special Term of the Supreme Court held in the county of New York, where Alphonse J. Stephani, the life convict, resided at the time of his conviction; and the applicant was Charles J. Stephani, an uncle of the life convict. The application must be made upon personal notice of not less than twenty days to the convict and to the district attorney of the county in which the conviction took place. The notice thus required to be given was properly proved by an affidavit of due and timely service. Notice must also be given "to such other persons as would be entitled to notice of application for the probate of the will of such convicted person if he were then dead leaving a will of real and personal property, to be given in like manner as notice of application for such probate." The petition set out the names and residences of all the next of kin and heirs at law of the life convict. In addition to the petition the papers attached to the complaint contained notices of appearance in behalf of each of these per-

sons with one exception, waivers of the issuance and service of any citation or other notice of the application and consents that the prayer of the petition be granted. This exception is Marie Hill, who is described in the petition as an aunt of the life convict residing at 3 Lindenstraase, Frankfort, Germany. The order to show cause granted upon the petition provided for service upon her by publication or, at the option of the petitioner, by serving a copy of the order and petition upon Marie Hill personally and also directed the deposit of a copy of the papers in the post office in the city of New York addressed to the lady at her German residence, as above specified, in Frankfort. Proof of personal service in accordance with this alternative provision of the order is furnished by the affidavit of a resident of that city. Upon such application as was embodied in this petition and due proof of the service of the notice prescribed, the act of 1889 empowers the Supreme Court to appoint a committee of the estate of the convicted person. This power was exercised by the appointment of the respondent corporation. The order of appointment contains various additional provisions permitted by the statute in regard to the payment of the debts of the life convict and the application of a portion of the income for his benefit to supply him from time to time with such necessaries of life as may be required for his comfort and not inconsistent with the regulations of the state prison authorities.

Were it not for the transfer of the convict from the state prison at Sing Sing to the Dannemora Hospital for Insane Convicts it is scarcely possible that any question could arise as to the applicability of the act of 1889 to the circumstances here presented. Indeed, nowhere else in our statutes does there appear to be any express provision of law for the appointment of a committee of the property of a life convict. It is insisted, however, that these provisions do not apply to the case of such a convict who has become insane; and that if they ever did apply to such a case they were repealed by implication by the enactment of section 2323a of the Code of Civil Procedure, which was added to the Code in 1895. Special reliance is

placed by the learned counsel for the appellant upon the language at the beginning of that section which allows the petition for the appointment of a committee to be presented on behalf of the state by a state officer having special jurisdiction over the institution or by the superintendent thereof "where an incompetent person has been committed to a state institution in any manner provided by law and is an inmate thereof." It is argued that Alphonse J. Stephani is an incompetent person and that the Dannemora Hospital for Insane Convicts is a state institution to which he has been committed in a manner provided by law; and hence that this case falls precisely within the terms as well as the spirit of the statute which should be regarded as having effected a repeal of the act of 1889 as to those cases in which a person sentenced to imprisonment for life has become insane after his incarceration began. There are several valid answers to this argument. Section 2323a of the Code was added to title VI in 1895 together with another new section (2336a) to establish a scheme whereby steps might be taken at the instance of the officers having charge of the various state hospitals for the insane to reimburse such institutions for their expenditures for the support of insane patients who had no relatives or friends liable or willing to contribute to their support, but where the patient was the owner of property which ought to be used to defray such expenditures. In most of the cases contemplated by these sections there would be an express adjudication of mental incompetency before the patient was committed to the institution; and, therefore, the section omits any provision for such an adjudication and empowers the court to appoint a committee, if satisfied of the truth of the facts required to be stated in the petition, immediately and without taking any further proof. So in section 2336a it is provided that sections 2325 to 2336, both inclusive, in the same title, "shall not apply to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement, in whole or in part, for maintenance and support in a State institution." In neither of these sec-

tions which were added in 1895 is there a word about life convicts nor anything to indicate that the legislature could have supposed that it was dealing with the subject-matter involved in the act of 1889, to wit, the sequestration, custody and administration of the property of persons who had been sentenced to imprisonment for life and were, therefore, deemed to be civilly dead. (Penal Code, § 708.)

On the other hand, a careful consideration of the provisions of the act of 1889 makes it tolerably clear that that statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced whether the convict should thereafter become insane or not. No good reason is apparent nor has any been suggested why its provisions are not just as adequate to furnish proper protection to the interests of an insane convict as to those of one who continued to be mentally competent. The measure is framed with extreme care in respect to the requirement of notice not only to the owner of the estate but to every one who can possibly have any interest therein. There is ample provision for the fullest judicial inquiry as a basis for the adjudication to be embodied in the final order. The court is authorized to control the committee in the performance of its duties so as to promote the benefit of the estate and acting upon such authority in this very case it expressly empowered the respondent to apply a portion of the income, if it saw fit to do so, to the purchase of such necessities of life as might conduce to the comfort of the prisoner. Indeed the spirit of this statute seems precisely the same as the principle which has often been said to underlie all proper legislation with reference to the insane — that is to say, a beneficial purpose on the part of the state to take the best possible care of their property.

I am unable, therefore, to find anything in the Code amendments of 1895 (Code Civ. Pro. § 2323a and § 2336a) which operates as a repeal of chapter 401 of the Laws of 1889, concerning the estates of prisoners sentenced to imprisonment for life. There is no conflict between the enactments and I am clearly of opinion that the proceeding which resulted in the

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appointment of the respondent was properly instituted under the earlier statute. It seems to me that the most that can be conceded in the direction of the argument for the appellant is that the law offers a choice of two methods of procedure under such circumstances as were presented in the case of this life convict; and perhaps a proceeding undertaken and carried to a final order under the Code provisions would have resulted in just as valid and effective an appointment of a committee as the proceeding which was had under the act of 1889. It is sufficient, however, for the maintenance of the title of the respondent here to hold that the Supreme Court had jurisdiction to make an appointment of a committee under the statute by virtue of which it assumed to act.

One further objection on the part of the appellant requires notice. The final order appointing a committee was made upon the proof of service, waiver and appearances already mentioned and upon the failure of any of the parties to oppose the application. It is contended that even if the proceeding was properly instituted under chapter 401 of the Laws of 1889 there was no jurisdiction to appoint the committee, because the petition failed to state the age of the petitioner or of any other parties, or whether they or any of them were incompetent. While these and other objections of a like character might have been available in the special proceeding itself, and in behalf of the parties whose interests were affected thereby to defeat the application for the appointment of the committee, they are not open to collateral attack in this action through the agency of a demurrer. The proceeding was in a court of general jurisdiction. "Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment is as valid as though every fact necessary to jurisdiction affirmatively appeared." (*Gridley v. College of St. Francis Xavier*, 137 N. Y. 327.) This was held with reference to a proceeding in the old Court of Common Pleas of the city and county of New York insti-

tuted for the purpose of having a person declared incompetent to take care of herself and her property on the ground of idiocy.

I think that this case was correctly determined in the courts below and that the judgment should be affirmed, with costs.

CULLEN, Ch., J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur.

Judgment affirmed.

SAMUEL T. SHAW et al., Individually and as Executors and Trustees under the Will of JULIA A. SHAW, Deceased, Respondents, v. THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

1. ELEVATED RAILROAD — INEFFECTIVE CONSENT TO CONSTRUCTION OF ROAD. A statement by an abutting owner, "I am in favor of an elevated road over the middle of the street but not on the walk," written by him upon a paper circulated on behalf of the railroad company amongst property owners, underneath a heading which, if subscribed without any qualifications or limitations, would have amounted to and constituted a general consent to the construction of the road, assuming that it was a consent to anything, cannot be construed as cutting off a claim for damages for the subsequent construction and operation of the road upon the sidewalk.

2. EVIDENCE OF COMPANY'S FAILURE TO ACT UPON ALLEGED CONSENT. An application thereafter by the railroad company to the proper authorities for permission to construct a road, including such owner as among those refusing to consent to its construction, is evidence justifying a finding in an action for damages that the company did not act upon or accept the alleged consent.

3. CONSENT NO BAR TO ACTION FOR DAMAGES BY SUBSEQUENT GRANTEE WITHOUT NOTICE. Assuming that the statement was a consent to the construction of the road, in the absence of evidence that it was recorded or notice thereof given to a subsequent grantee of the premises who took title before the commencement of the construction of the road, it would not bar his claim for damages.

4. TESTIMONY OF DECEASED WITNESS READ ON NEW TRIAL. The evidence of a deceased witness given on the trial of an action for damages brought against the original company, may be read on a new trial of the action against the lessee brought in as defendant. It is unnecessary

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to determine whether section 880 of the Code of Civil Procedure, as amended by chapter 352 of the Laws of 1899, limiting such evidence to a new trial between the same parties or "their legal representatives," would permit the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stands in the absence of an express or necessarily implied repeal.

5. WHEN ERROR IN ADMISSION OF EVIDENCE AS TO VALUE IS CURED. The admission of evidence of experts as to the value and rental value of an entire block as a basis for fixing the value and rental value of a separate piece therein, constitutes error, but is cured when on cross-examination they testify as to the separate values of the various lots constituting the entire parcel, so that it is possible for the trial court to apportion the evidence of aggregate value and apply the proper figures to the parcel in question.

6. EVIDENCE OF GENERAL APPRECIATION OF VALUES IN OTHER LOCALITIES. Testimony as to what the value of property would have been if a railroad had not been built is inadmissible, but a witness may state that there had been a general appreciation in real estate values in other localities and that except for the construction of the road the same general course in values would have prevailed in the locality in question.

Shaw v. N. Y. El. R. R. Co., 110 App. Div. 892, affirmed.

(Argued December 17, 1906; decided January 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 11, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John L. Cadwalader, Howard Mc Williams and Charles A. Gardiner for appellants. The paper signed by James E. Shaw, purporting to be a consent to the construction and operation of the elevated railroad in Forty-second street, is a valid defense to the first cause of action. (*White v. El. R. R. Co.*, 139 N. Y. 19; *Heimburg v. El. R. R. Co.*, 162 N. Y. 352; *Bellew v. N. Y. W. & C. T. Co.*, 47 App. Div. 447; *Thompson v. S. Ry. Co.*, 178 N. Y. 102; *Adee v. N. E. R. R. Co.*, 65 App. Div. 529; *Herzog v. R. R. Co.*, 76 Hun, 485; *Ward v. R. R.*

Co., 152 N. Y. 39; *Mitchell v. R. R. Co.*, 134 N. Y. 11; *Sterry v. Arden*, 1 Johns. Ch. 267; *Hawley v. Cramer*, 4 Cow. 717.) The trial court committed reversible errors in rulings on questions of evidence. (*Jamieson v. N. Y. E. R. R. Co.*, 147 N. Y. 322; *Witmark v. El. R. R. Co.*, 149 N. Y. 393; *Robinson v. El. R. R. Co.*, 175 N. Y. 219; *Levin Case*, 165 N. Y. 577; *Boetzkes Case*, 1 App. Div. 526; *Innes Case*, 3 App. Div. 541; *Stuyvesant Case*, 4 App. Div. 159; *O'Sullivan Case*, 20 App. Div. 384; *Roberts Case*, 128 N. Y. 455; *Doyle Case*, 128 N. Y. 488.) The learned trial court erred in admitting the testimony of a deceased real estate expert witness taken on a former trial. (Code Civ. Pro. § 830; *Wallach v. M. Ry. Co.*, 105 App. Div. 422; *Varnum v. Hart*, 47 Hun, 18; *Young v. Valentine*, 177 N. Y. 347; *Jackson v. Lawson*, 15 Johns. 18; *Moorehouse v. Moorehouse*, 11 Civ. Pro. Rep. 20; *Gunby v. M. S. Ry. Co.*, 30 Civ. Pro. Rep. 217.)

W. G. Peckham, M. S. Isaacs and I. S. Isaacs for respondents. The alleged consent was either a declination or a limitation, subject to a condition or expression of opinion. Moreover, there was no meeting of minds on the paper in evidence. (*Koehler v. El. R. R. Co.*, 9 App. Div. 451; *Roberts v. El. R. R. Co.*, 155 N. Y. 38; *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 353; *Murdock v. R. R. Co.*, 73 N. Y. 583; *Korneder v. B. El. R. R. Co.*, 41 App. Div. 358.) Conditional consents are invalid, and such informal papers must be construed, *strictissimi juris*, before they can operate as defeasances of realty. (*Roberts v. El. R. R. Co.*, 155 N. Y. 38; *Foote v. El. R. R. Co.*, 147 N. Y. 370; *Watson v. El. R. R. Co.*, 29 N. Y. S. R. 513; *Snell v. Leavitt*, 110 N. Y. 604.) The dead expert's testimony was properly admitted in evidence. (*N. Y. M. L. Ins. Co. v. Armstrong*, 117 U. S. 591; 172 N. Y. 152; *Young v. Valentine*, 177 N. Y. 337; *McAdam on Landl. & Tenant*, 146; *P., etc., R. R. Co. v. Howard*, 13 How. [U. S.] 307; *Moorehouse v. Moorehouse*, 11 Civ. Pro. Rep. 33; *M. S. Ry. Co. v. Gunby*, 30 Civ. Pro. Rep. 217; *Wallach v. El. R. R. Co.*, 105 App. Div. 424.)

HISCOCK, J. This action was brought in the usual form to enjoin the operation of an elevated road originally constructed by the New York Elevated Railroad Company and thereafter at different periods leased and operated by the other defendants, respectively, through Forty-second street in front of plaintiffs' premises, unless compensation should be made for the damages claimed to have been caused to the fee and rental value of said premises through impairment of the various easements appurtenant to said property.

The entire property in question has a frontage upon Forty-second street of 130 feet and is bounded upon the westerly side by Park avenue. It originally consisted of two parcels, one situate at the corner of Park avenue and Forty-second street, having a frontage upon the latter of 64 feet, and the other parcel adjoining the first one upon the east and having a frontage upon Forty-second street of 66 feet. The first of these parcels was referred to upon the trial as the "Westchester House" piece. These two parcels in turn are part of a larger parcel extending from Forty-second street through to Forty-first street, and in its entirety known as the Grand Union Hotel, the frontage upon Park avenue and consequent depth of the entire parcel being 197 feet 6½ inches.

The trial court awarded as fee and annual rental damages in the case of the parcel first mentioned \$40,500 and \$2,400, respectively, and for similar damages in the case of the second parcel \$37,000 and \$2,200, respectively. It was conceded and ruled upon the trial that no damages should be allowed for damages to the southerly half of the entire piece of property fronting upon Forty-first street.

Upon a former trial, fee and rental damages were allowed in the case of the corner parcel in the sums, respectively, of \$25,000 and \$1,500, and no damages were allowed in the case of the second or interior parcel, upon the ground that one James E. Shaw, the original owner of the property, had consented to the construction of the railroad.

Many exceptions were taken to the rulings of the trial court, which are argued upon this appeal, and such of them as seem to require it will be considered in order.

First. In accordance with the decision of the learned Appellate Division upon the former appeal, the trial court rejected defendants' claim that plaintiffs' predecessor in title had consented to the construction of the road as to the interior parcel of land, so as to bar them from recovering for damages thereto, and I think this ruling was correct for several reasons.

(1) The alleged consent consisted in James E. Shaw, being then the owner of the property, writing the words "I am in favor of an elevated road over the middle of the street, but not on the walk," upon a paper circulated in behalf of the railroad company amongst property owners, underneath a heading which, if subscribed without any qualifications or limitations, would have amounted to and constituted a general consent to the construction of the road.

It perhaps may be doubted whether the language employed amounted to a consent to anything, or was more than a tentative expression of what the property owner would favor, subsequently to be evidenced by a more formal declaration. Assuming, however, that it was a consent, it was certainly a qualified and conditional one, which, if accepted, must be complied with. The trial court has found that there was no compliance with such consent, and that in violation thereof defendant "built its structure upon both sidewalks and there maintained it for many years, and still maintains it on the north sidewalk of 42nd Street, and the signature of Shaw as signed was in no sense a consent to the various structures built and various uses made of the street by the railroad." The defendants cannot claim immunity by reason of a proffered consent, with the terms of which they refused to comply.

(2) Regarding the words signed by Shaw as a conditional or qualified consent, the railroad had a perfect right to reject it and refuse to act upon it or be bound by it. As already suggested, if it did accept it, it could be compelled to comply with its terms, which evidently were objectionable, and rather than do this it was at liberty to treat Shaw as having refused to give a consent, and to proceed upon the ground that he was

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opposed to the construction of the road. This is just what it did do. The trial court has found that "The railroad did not act upon the faith of the above (alleged consent) in the construction of the road. The road accepted the paper as not a consent, and later treated the paper as not a consent." The evidence in support of this finding, and to the criticisms upon which reference will hereafter be made, is to the effect that subsequently the railroad made application to the proper Board for authority to construct its road through Forty-second street, and upon such application, and in order to lay the foundation therefor, included Shaw as amongst those who had refused to consent to the construction of the road. Having thus rejected this writing and having utilized it in adverse proceedings as a refusal, the road was not at liberty upon this trial to reverse its position and claim a consent. It seems to me that the facts as presented upon this appeal are clearly to be differentiated from those upon which was based the decision in *Paige v. Schenectady Railway Co.* (178 N. Y. 102), which is relied upon by appellants as establishing the doctrine that a consent given to and accepted by a railroad company for the construction of its road cannot thereafter be waived or surrendered without the consent of the stockholders and other parties interested. This doctrine was entirely applicable to the facts appearing in the *Paige* case because there there was no question but that the property owner had given a consent which had been accepted and acted upon by the railroad in the construction of its tracks and the corporation had become vested with rights based upon such consent which naturally and logically could not be voluntarily given up by the receiver of the road. In this case, if I am right, the corporation utterly refused to accept the proffered consent and no question can arise over a surrender voluntarily and without consideration of some right which it has never accepted and with which it has never become vested.

The learned counsel for the appellants has criticised certain evidence upon which was based, as he assumes, the finding that the company did not act upon or accept this alleged con-

sent. This evidence consists of an affidavit used upon an application by the railroad company to the Board of Commissioners for leave to construct the road, and which affidavit was made by one Taylor who had been engaged in procuring consents of property owners, and wherein were classified the responses of the property owners to the requests for consents. In this classification it is claimed that Shaw was included as having declined to consent. It is argued that the affidavit does not sufficiently authorize the inferences claimed for it by the respondents, and that even if it does the conclusions and classification of a mere canvasser or clerk should not be accepted as controlling upon the corporation. The first point does not seem to be well made and the answer to the last proposition is that the corporation accepted and ratified the conclusions of Taylor by making the affidavit part of the papers upon which its application was based.

(3) The title which Shaw held to this parcel in 1877 passed to Mrs. Shaw, the predecessor of plaintiffs, under a deed from one Hayes which recited a valuable consideration. The construction of the road in front of the premises was not commenced until the following year, and the trial court has found that "there was no notice, so far as it appears, to plaintiffs or to their devisor (Mrs. Shaw) that Shaw had ever signed anything in the nature of a consent." No attempt was ever made to record the purported consent. Under these circumstances I think that Mrs. Shaw took her title unaffected and unimpaired by the act of her husband independent of any other consideration.

There was no such open, visible and notorious occupation by the defendants of the street under the consent, assuming it to have been one, as would operate as a notice to the plaintiffs of defendants' rights. (*Ward v. Met. Elev. Ry. Co.*, 152 N. Y. 39.)

Second. This action was commenced and once tried before the Interborough Rapid Transit Company had become a lessee and, therefore, an appropriate party. Upon the second trial such company was by stipulation brought in as a defend-

ant and appeared by the same attorney who had already appeared in the action for the other defendants. One of plaintiffs' witnesses upon the first trial (Flock) died pending the second trial and when plaintiffs' counsel attempted to read his evidence the same was objected to by the Interborough company as inadmissible under the Code, the objection, however, being overruled.

'Section 830 of the Code as amended by chapter 595 of the Laws of 1893 provided that "The testimony of any witness who has died or become insane after a former trial or hearing of * * * an action, may be read upon a subsequent trial or hearing, by any party to such action or proceeding, subject to legal objections."

There is no doubt that the term "party" in this connection included a privy such as would be a lessee in respect to his lessor. (*Jackson v. Crissey*, 3 Wend. 251, 252; *O'Donnell v. McIntyre*, 118 N. Y. 156, 162; *Bennett v. Couchman*, 48 Barb. 73, 81.)

By chapter 352, Laws of 1899, said section 830 was again amended so as to provide that the testimony upon a former trial of such a deceased witness might be read upon a subsequent trial of the same action "between the same parties who were parties to such former trial or hearing, or their legal representatives."

It is urged that the employment of the words "legal representatives" has modified the application of this provision as it formerly existed and that such words do not include a privy such as a lessee. It is unnecessary to spend time in considering how well founded may be appellants' contention in this regard, for a complete answer to the exception here urged is found elsewhere than in the construction of this section. Independent of statute the common law permitted the evidence of a deceased witness to be read as between the original parties or their privies. (*Jackson v. Bailey* 2, Johns. 17, 19; *Bradley v. Mirick*, 91 N. Y. 293, 295.) And there is no such conflict between the Code and this rule as works the abrogation of the latter in the absence of express repeal.

(Am. & Eng. Ency. of Law, vol. 26, page 662 and cases there cited.)

Therefore, the evidence was competent under the common law even if not so under the statute.

Third. Two of plaintiffs' witnesses (Winans and Flock) were allowed, in spite of defendants' objections, to give evidence of the value of the entire Grand Union Hotel property exclusive of the Westchester House corner, for the purpose of furnishing a basis upon which to compute damages. Such evidence included the southerly half of the block fronting upon Forty-first street. It was pressed upon the court by plaintiffs' counsel in spite of the rule accepted upon the trial that no damages could be allowed for such frontage and notwithstanding the suggestions of the court itself at the time that such evidence was probably incompetent. It was incompetent and ought not to have been offered or admitted, and if we were confined upon this appeal to the arguments addressed to us by respondents' counsel, we should be unable to find any sufficient reason for overlooking the error. An examination of the record, however, discloses that the objectionable course of plaintiffs' counsel was cured by the cross-examination of the witnesses. At various places the witnesses who had given the aggregate valuation of the property including that upon Forty-first street were, respectively, cross-examined in detail as to the separate values of the various lots which constituted the entire parcel. I think that in the case of each witness this cross-examination so disclosed the value which he put upon each portion of the property included in his objectionable aggregate valuation that the court would have no difficulty in apportioning the latter valuation properly as between the property which was and the property which was not involved. Of course, it is not held that defendants' counsel by his cross-examination in any way waived the objections made by him to the improper evidence offered by plaintiffs' counsel. The point is that by his cross-examination he supplied such details of valuation as cured the original error through making it possible for the court to apportion the evidence of aggregate

value, and apply the proper figures to the frontage upon Forty-second street.

It is also urged that similar error was committed by the court in allowing the witness Flock to give the rental value of the entire property in 1873, and as of a later date.

I do not think that the objection taken to this evidence fully and fairly raised the question now being argued, because it was not correct to urge that any evidence relating to property outside of the Westchester House raised a collateral issue. That objection ignored the balance of the property fronting upon Forty-second street, as to which evidence might be properly introduced. But here again I think that so much evidence was introduced upon the examination of the witness Ford, in the detailed statement of the rents produced from year to year, and in the schedule of rooms fronting upon 41st and 42nd streets, with respective rental values, and otherwise, that the evidence in question does not present sufficiently serious error to call for a reversal of the judgment. And still further, I think that some of the evidence drawn out by defendants' counsel in regard to rentals upon 41st street was beyond that which he was entitled to in response to what plaintiffs' counsel had previously called out; that he voluntarily opened up the subject of rental values of property other than that fronting upon 42nd street.

The evidence objected to, as to the rents of rooms fronting upon 41st street, was not very material, because the court conceded did not allow for damages upon 41st street. In addition to this, I am not prepared to say that this evidence in connection with that relating to the rents of rooms fronting upon 42nd street was not competent as indicating a lower rental value of the latter on account of the existence of defendants' railroad.

Fourth. Plaintiffs' expert witness Flock was interrogated and testified as follows: "Q. You have spoken of a difference between the course of values where the elevated road runs on 42nd Street and where it does not run on 42nd Street and other streets? A. Yes, sir. Q. Supposing there had been

no elevated railroad, state whether or no there was anything in the situation to make the course of values in this part of 42nd Street run differently from the course of values on the other parts of 42nd street and the other streets you have mentioned? Defendants' Counsel: That is objected to as incompetent, improper, inadmissible and speculative. [Objection overruled. Defendant excepts.] A. It would not be if there was no elevated railroad. Q. The percentage would have been largely the same? Defendants' Counsel: I object to that upon all the grounds previously stated and I object upon the additional grounds that it is invading the province of the court, in other words, usurping the functions of the Court, and passing upon questions that the court should pass upon. [Objections overruled. Defendants except.] A. Yes, sir."

Previous to this the witness had testified to a certain percentage of increase in values of property in other localities where an elevated road had not been constructed, and to a smaller percentage of increase where it had been constructed. Upon this evidence the argument is based that, in effect, the witness was allowed to testify that respondents' property would have increased in value by a certain percentage if the road had not been constructed and that this evidence came within the prohibition of *Roberts v. N. Y. El. R. R. Co.* (128 N. Y. 455) and other similar cases where it was held that a witness would not be allowed to testify what the value of property would have been if a railroad had not been built, that being a question to be decided upon evidence of facts rather than upon speculative opinion.

I do not think that this was the fair intent or scope of the evidence offered, but that respondents' counsel was simply endeavoring to show that there had been a general appreciation in real estate valuations in other localities, and that except for the construction of the road about the same general course in valuations would have prevailed in 42nd street as elsewhere, and that such evidence was competent. (*Hunter v. Manhattan Ry. Co.*, 141 N. Y. 281.)

It is to be noted that the evidence of the witness specifying the percentage or proportion of increase in valuations of real estate was not directly responsive to the questions which were asked, but proceeded further than was required by such questions, they simply calling for the general course of values. The specification by the witness, however, of the precise extent to which he thought the appreciation in values had proceeded, was not regarded as material enough to prompt a motion by counsel to strike the same from the record, and when the witness stated that in his judgment "the percentage would have been largely the same" in the case of the 42nd street property as elsewhere, I think all that was meant thereby was that the same general course in values would have prevailed there as elsewhere.

In the *Hunter* case (page 287) it was held that a witness might properly answer the question, "In your judgment is there anything in the condition of Beaver and Water Streets which should induce the upward rise in values greater than would have existed in Pearl Street had there been no elevated railroad." When the witness in the case at bar testified that the same percentage would have prevailed in 42nd street as elsewhere, his evidence in effect was the same as that given in the *Hunter* case, that the upward rise in values elsewhere was not greater than would have prevailed in the locality of respondents' property if the road had not been constructed. (See, also, *Remsen v. Met. Elev. Ry. Co.*, 9 App. Div. 533.)

The case of *Jamieson v. Kings County Elevated R'way Co.* (147 N. Y. 322) does not appear to me to lay down any rule which is infringed by the admission of the evidence in question. That case held that it was improper to call owners of various parcels of land not involved for the purpose of showing the valuation of such parcels respectively before and after the construction of the railroad and thereby precipitate a number of collateral issues. It did not deny but rather recognized the propriety of showing a general course and current of values.

If the evidence here being considered is subject to the criticism that questions properly calling for a general course of values were improperly answered with a statement of objectionable details, the error should have been corrected by proper motion.

All of the other objections urged by the learned counsel for the appellants have been considered, but it is clear that none of them present such serious error as to call for a reversal of the judgment and, therefore, they are not discussed at length.

The judgment should be affirmed, with costs.

GRAY, J. (dissenting). I dissent, upon the ground that it was error for the trial court to admit the evidence of the witnesses called as experts as to the values of other property in the vicinity of the plaintiffs' property on Forty-second street. This was in violation of the rule laid down by us in the *Jamieson Case* (147 N. Y. 322); a rule which has invariably been adhered to. The error was material and the objection taken to the admission of such evidence distinctly called the attention of the court to the point. If the rule has any value in this class of cases, the error in departing from it should not be disregarded.

CULLEN, Ch. J., WERNER and CHASE, JJ., concur with HISCOCK, J.; O'BRIEN and EDWARD T. BARTLETT, JJ., concur with GRAY, J.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
FRANK FURLONG, Appellant.

1. MURDER — INSANITY — SUFFICIENCY OF EVIDENCE. The evidence upon the trial of an indictment for murder examined, particularly that relating to a defense that the crime was committed while the defendant was under the influence of epileptic furor, and held, that it was not only sufficient to sustain a verdict convicting him of the crime of murder in the first degree but that there was no reasonable doubt that the homicide was committed by him and that he knew the nature and quality of the act he was doing and that the act was wrong.

2. EVIDENCE — ADMISSIBILITY OF STATEMENTS MADE BY DEFENDANT TO MEDICAL EXPERT WHO EXAMINED HIM DURING THE TRIAL AND SUBSEQUENTLY RELATED THEM TO JURY — USE OF MINUTES OF STENOGRAPHER WHO ATTENDED EXAMINATION IN INTERROGATING EXPERT. Statements made by defendant to a medical expert who, at the request of the court, had examined him after warning him that his answers to questions might be used against him, and subsequently related to the jury by such expert, are not incompetent as within the constitutional prohibition against compelling a defendant to give testimony against himself; nor does the fact that several of the questions to and answers by the defendant were read to the jury from the minutes of a stenographer who had attended the examination, after such expert had sworn that the questions were so put to the defendant and answered by him, instead of the witness giving separately each question and answer from his unaided memory or after refreshing his recollection, constitute error.

3. REASON FOR EXCLUSION OF DEFENDANT'S STATEMENTS AS TO TRANSACTIONS PRIOR TO TIME OF TRIAL, NOT APPLICABLE TO TRIAL IN BEHALF OF PEOPLE. While unsworn statements by the defendant as to transactions prior to the time of the trial cannot be given in evidence in his behalf to be used as a basis for an expert opinion as to his sanity at the time of the commission of the crime, the reason for excluding such testimony is not applicable where the statements are for use on a trial, in behalf of the people.

(Argued December 20, 1906; decided January 15, 1907.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York, rendered January 30, 1905, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

John F. Cowan for appellant. The evidence of conversations between the witness Flint and the defendant was incompetent as compelling the latter to be a witness against himself. (*People v. Kemmler*, 119 N. Y. 580; Const. N. Y. art. 1, § 6; *People v. Mondon*, 103 N. Y. 221.) The admission of such conversation as bearing upon defendant's mental condition at the time of the homicide was irrelevant and improper. The uniform rule is that the result of interviews by an expert with a defendant is only competent where it is asserted that the defendant has been continuously insane from

a period prior to the killing and up to the time of the examination. (*People v. Nino*, 149 N. Y. 317; *People v. Hawkins*, 109 N. Y. 408; *People v. Strait*, 148 N. Y. 571; *People v. Lake*, 12 N. Y. 358.)

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for respondent. The testimony of Dr. Flint was competent. (*People v. White*, 176 N. Y. 331; *People v. Gardner*, 144 N. Y. 119; *People v. Truck*, 170 N. Y. 203; *People v. Van Wormer*, 175 N. Y. 188; *People v. Mills*, 178 N. Y. 274; *People v. Adams*, 85 App. Div. 390; 176 N. Y. 351; *Adams v. City of New York*, 192 U. S. 585.) The admission of the defendant's conversations with Dr. Flint was proper. (*People v. Hoch*, 150 N. Y. 291; *People v. Carpenter*, 102 N. Y. 238; *People v. Hawkins*, 109 N. Y. 408; *People v. Nino*, 149 N. Y. 317; *Austin v. Bartlett*, 178 N. Y. 310; *Connolly v. B. H. R. R. Co.*, 179 N. Y. 7; *People v. Wolf*, 183 N. Y. 464; *People v. Silverman*, 181 N. Y. 235.)

CHASE, J. The defendant has been convicted of the crime of murder in the first degree in having killed Margaret Keeler. The brief filed in the defendant's behalf on the appeal to this court commences with the following statement: "There is no dispute as to the facts and circumstances of the homicide. They would justify the conclusion that the homicide was either a brutal murder, or the act of a lunatic."

On the 28th day of November, 1904, Margaret Keeler lived with her husband and two children in one of three apartments on the second floor of No. 82 East 115th street in the city of New York. On that morning her husband left the house at ten minutes before seven o'clock and did not return until after the homicide. After her husband left she called her two children and served their breakfast, and they then went to school. One of the children left the house for school about twenty-five minutes before nine o'clock and he says that his mother was then helping his sister put on her coat

and that his sister left the house a minute later than he did, leaving his mother alone in the house. The children returned from school that day about ten minutes after twelve o'clock, and found the doors of the apartment locked. The janitress of the building gave them some lunch and they returned to school. They returned to the apartment again about ten minutes after three o'clock. As they were then unable to get into the apartment they called the janitress, and the three tried to open the doors, but were unable to do so and they went into an adjoining apartment, and one of the children went on the fire escape to a window of the Keeler apartment and opened it, and so entered their kitchen. On the floor of the kitchen he found a pool of blood, and in the blood were two combs that had been worn by his mother. He went into one of the bedrooms, and there he found his mother lying on the bed, dead. The kitchen door was locked and the key was in the lock. The parlor door was locked and the key had been removed. Mrs. Keeler lay on the bed with her face down, her head was toward the foot of the bed, in a pool of blood, and one of her feet was between the bars at the head of the bed. Her hair was down and matted with blood. The homicide was reported to the police, and they came to the apartment and found the pools of blood and the body of Mrs. Keeler as stated. The tablecloth on the table in the kitchen and the chairs near it had blood stains and finger-marks on them, and near the pool of blood in the kitchen they found an iron bar on which were blood and pieces of human hair which resembled the hair of Mrs. Keeler.

The autopsy showed twelve lacerated and ragged wounds on the front and top of the scalp. Eight of these wounds extended through the scalp to the skull, and four of them included a compound comminuted fracture of the skull and lacerations of the brain. The fractures of the skull included compound comminuted fractures of the frontal bone and depressed fractures of the left parietal and left temporal bones. Her face was blackened over the eyes, and there was a lacerated wound over the second joint of the index finger of

the right hand about one inch in length. Death was caused by the fractures of the skull and injuries to the brain. The wounds could have been made by the iron bar that was found by the pool of blood. The condition of the body at the time it was found indicated that death had occurred several hours before.

When Mr. Keeler left the house in the morning, Mrs. Keeler had earrings in her ears, two rings on her fingers, and there was on the sideboard in the apartment a purse with a small amount of money therein; and there was also in the apartment a watch and chain belonging to one of the children. When Mrs. Keeler was discovered after the homicide, the ear and finger rings were missing, the money had been removed from the purse, and the watch and chain could not be found.

The defendant at the time of the homicide was about nineteen years of age. He was a nephew of Mrs. Keeler, and came to visit the Keelers occasionally, and when he did so Mrs. Keeler generally gave him his breakfast or his meal, or whatever he wanted.

On the morning of the homicide a woman who lived in one of the apartments adjoining that of Mrs. Keeler started about half-past nine o'clock to go from her apartment to the floor below, and when she arrived at the stairs in the hallway she met a young man whose description corresponds with that of the defendant. He went in the direction of the door of the Keeler apartment, and she heard him knock. The woman proceeded to the floor below and did not see any more of the young man. About twenty minutes past ten o'clock on the day of the homicide a young man, who had been accustomed frequently to meet and go around with the defendant, met him at 117th street and Third avenue in front of an oyster booth, where he was talking with a little boy. The defendant gave the boy a ten-cent piece, and then asked the young man who there met him to go into a saloon and have a drink with him. They went in the saloon and had a drink, and the defendant asked the others in the saloon, including the bar-keeper, to have a drink. The defendant told the young man

that he was going up to a poolroom, referring to a place where they had been accustomed to meet, and the young man met him there shortly afterwards, and they commenced playing pool together. The young man said that he noticed that the defendant was "acting kind of queerly" and that he asked him repeatedly what was the matter, without getting any reply, and that after asking him three or four times the defendant said "Oh! There is nothing the matter with me, just let me enjoy myself," and he afterwards said that defendant's words were "Let me enjoy myself to-day." He continued to ask the defendant what was the matter and the defendant showed him a spot on his trousers and said "That ought to tell you." The spot on his trousers was above the knee on the left leg, and it was a dark red spot, and the young man said to the defendant "That don't tell me anything," and the defendant said "All right, never mind, come on and shoot pool." The defendant appeared to be sick and went into the toilet and vomited, and the manager of the poolroom asked him what was the matter, and the defendant said "You will read about it in the papers to-morrow." He continued playing pool and showed the young man a pair of earrings and a finger ring, and he said "There is nothing the matter only I have got to have some money." He asked the young man to pawn them for him but the young man refused. After remaining in the poolroom until about half-past three o'clock in the afternoon he went to a pawnbrokers and pawned the earrings, giving the name of "Smith," and received fifteen dollars thereon. During the afternoon a ring was pawned at the same pawnbrokers, and at other brokers in the same avenue another ring and a watch and chain were pawned. The pawnbrokers who took the property other than the earrings were unable to identify the person from whom they received the property. The earrings and the finger rings which the defendant showed to the young man in the poolroom on the day of the homicide and all the property mentioned as having been pawned were fully identified as the rings and property taken from the Keeler apartment.

Mr. Keeler also testified that the iron bar found in the kitchen had not been in the apartment prior to that day.

The defendant was not in the places where he had been accustomed to spend his time after November 28th to December 3rd, when he came into the poolroom where he had played pool on November 28th, hatless and wearing different trousers than those that he had worn when he was there the last time, and on leaving the poolroom he was arrested. The officers of the police department had been in constant search for him from the evening of November 28th until the time when he was arrested.

To the officer who made the arrest, and also to the officers at police headquarters, he talked freely. The officer who arrested the defendant asked him if he killed his aunt and he replied, "No, I didn't do anything." But he admitted to the officer that he had taken the rings and jewelry from his aunt and pawned them. At the police headquarters he was questioned by a detective sergeant in the presence of two other officers. The defendant was first told that anything he might say would be used against him in court. The examination was taken by a stenographer, and after it was typewritten the defendant read it over and signed it. In that statement he said that he took the earrings out of the ears of Mrs. Keeler and the rings from her fingers while she was lying on the floor of the kitchen in her apartment. He also said that he took thirty-seven cents out of a pocketbook which he found on the sideboard in the bedroom off the parlor, and that he took the silver watch from the drawer of the dresser in the same bedroom where he got the money. He said he went out of the door of the apartment and took the key and put it in his pocket, and then went to the saloon at 117th street and Third avenue, and he stated with some detail what he did there and at the poolroom. He told about pawning the jewelry and watch, and of showing the bloodstains on his trousers to the young man who was at the poolroom with him, and he also said that after pawning the articles he went down to Houston street and exchanged the trousers that had the

blood stains on them for another pair that he then put on and that he obtained another hat.

The following questions and answers were among those taken on such examination, viz.: "Q. Where was the children of Mrs. Keeler when you struck her? A. They were at school. Q. Did Mrs. Keeler speak when you left the house? A. No she was groaning. Q. What time was it when you went into Mrs. Keeler's? A. It was after nine o'clock A. M."

He made a further statement to an officer after the officer had again stated to him that anything he said might be used against him in court. This statement was made with great detail and in it he told where he had pawned the different articles and the amount he received for each pawn; he also told of using the name "Smith" at one of the places, and the name "Curtis" at the other places. This statement included the following questions and answers: "Q. Did you have any trouble with Mrs. Keeler? A. I don't know that I had any trouble with her; I was drunk. Q. Did you have the iron bar with you? A. I suppose that I did, but I don't know. Q. Did you strike Mrs. Keeler? A. I struck Mrs. Keeler. Q. What did you strike her with? A. With the bar I guess? Q. Was there any blood on her? A. There must have been blood for I had some on my hands. Q. Was she lying on the floor when you took this jewelry? A. Yes. Q. When you left the house did you lock the door? A. Yes, and took the key with me. Q. How many times did you hit Mrs. Keeler? A. I don't know. Q. Did you search other rooms for other property? A. Yes."

At another time the officer showed him the iron bar that was found in the Keeler apartment, and asked him if it was the bar that he struck Mrs. Keeler with, and the defendant said, "Well it looks like it; must be if you found it there."

Soon after he was arrested he said to an officer, "I made up my mind that I would get a good feed before I got arrested." The officer said, "Where did you get it?" And the defendant said "I went in Thornton's restaurant and I ate about sixty cents worth and then I asked the waiter if he had any tobacco

that could make cigarettes and the waiter brought me two bags of tobacco and then I had no money in my pocket, I went over to the cashier and said 'Excuse me I'm going out for a paper,' and he said, "I run away leaving my hat. I ran down Third Avenue, and I got down to the poolroom; I knew I was going to get collared the minute I went in there, but I didn't care."

The defendant did not present a formal plea of insanity, but his counsel claims that it was agreed by the district attorney that testimony relating to the sanity of the defendant should be admitted as if the plea had been actually entered, and testimony was so received.

Counsel for the defendant claims that the homicide was committed while the defendant was under the influence of epileptic furor. The defendant's mother had an attack about two months after the birth of her first child, and prior to the birth of the defendant, which is characterized by lay witnesses as an epileptic fit. She became suddenly unconscious and had violent convulsions and frothing at the mouth. Between that time and the birth of the defendant she had six or eight such attacks, two within a few months before the defendant was born. The defendant when nine years old had a similar attack, and about three to six months thereafter a second similar attack. On several occasions between that time and the time of the homicide defendant was seen in a temporarily unconscious or semi-conscious condition with staring eyes and twitching of the muscles of the face. The defendant also when a small boy had a blow on his head with a piece of iron which raised a large lump and he complained of pain in his head for about a week thereafter. His mother died in 1900, but prior to his mother's death he had commenced working as a messenger boy, and he worked at various work and at different places, but irregularly, until the time of the homicide. He lived in boarding houses and lodging houses. From the time he was about twelve years of age he had smoked cigarettes almost constantly. Some of the witnesses in his behalf testified that they had known him for years and never

saw him without a cigarette in his mouth, and that he would get out of his bed in the night to puff on a cigarette for a few minutes before returning to bed. He drank whiskey and other liquors freely. He was addicted to sexual abuses and excesses and sodomitical practices. No physicians were called on behalf of the defendant but several witnesses were called who had been acquaintances of his and they testified to his constant smoking of cigarettes and to his other habits. They also testified to his being generally melancholy and disinclined to associate with or have conversations with others and that he frequently had to be asked several times before answering a question. When he came to the poolroom on the day he was arrested he said in response to a question as to where he had been that he had been flying over roofs, houses and fences.

The witnesses called in his behalf, and one or more of the witnesses for the People testified that the acts, practices and appearances detailed impressed them as irrational. The People then called the official physician at the prison where the defendant was confined after his arrest and until his trial, who testified that he had examined and observed the defendant while he was at the prison and had talked with him frequently, and that he found him physically and mentally normal, and that he was rational.

Dr. McDonald, a well known expert in cases of insanity and mental diseases, was sworn and testified that epilepsy is a chronic disease of the nervous system, and that it is divided by physicians into three forms; the first and second forms are characterized by sudden loss of consciousness and muscular convulsions or spasms. The second form differs from the first mainly in degree. The third form of epilepsy is known by physicians and writers as psychic or mental epilepsy. Referring to this form of the disease, the witness said: "The patient, instead of having an attack of grand mal, has a sudden outburst of maniacal fury, so to speak; a blind, motiveless fury in which he attacks those about him right and left, animate and inanimate, without any motive, and when he

emerges from that condition has no recollection of what has occurred ; his mind is a complete blank while it is in what we term the epileptic state." He further said : " A person suffering from or having passed through such a state would have no recollection of it whatever, and any knowledge that he had of it would have to be derived from outside sources." He testified that a convulsive seizure by itself would not be positive evidence of epilepsy ; that acute indigestion and pressure on the heart, and many other things, may produce an epileptic form of seizure that is not in fact epilepsy, just as children in teething and persons suffering from Bright's disease have epileptic convulsions that are not epilepsy. At the request of the district attorney he gave the defendant a physical examination in the presence of counsel for the defendant, and he also questioned him as to his history and habits and his recollection of the homicide. Before questioning him, the defendant was told that if any question was asked that he did not wish to answer, or the answer to which might harm him on the trial, he had a right to decline to answer. After the examination the witness testified that he did not find any physical indications of mental or nervous disease and that in his opinion the defendant was normal and entirely rational. He further testified in answer to a hypothetical question summarizing the testimony given on the part of the People that it did not indicate any degree of epileptic mania at the time the homicide was committed, and that the defendant in his opinion had capacity to understand the nature of the act and to know that it was wrong. He was then asked a similar question adding a summary of the testimony produced on behalf of the defendant and he gave a similar answer, and in answer to a similar question on behalf of the defendant including a summary only of the defendant's testimony he gave a similar answer.

The father of the defendant while giving testimony in this case fainted. Dr. McDonald was present and thereafter examined him, and he testified that the attack is known as syncope and that it was not epileptic in any of its characteristics.

Dr. Flint, another physician of great experience in mental diseases, was called as a witness by the People. Before he was called as a witness he had, in the presence of Dr. McDonald, given the defendant a physical examination and had questioned him in regard to his history, habits, education and also generally to ascertain his mental processes. He testified that before examining him he had said to him: "I thought it was for his interest to answer questions unreservedly and truthfully; that he might decline to answer any question that I might put to him, and * * * that while I was examining him in the interests of the court and not as either for or against him, that anything he said in answer to my questions might be used against him."

The examination was not made either at the request of the defendant or of the district attorney, and neither the district attorney nor the defendant's counsel was present at the examination or knew that it was to be held. Dr. Flint says that he was informed by some one that the court desired him to make the examination, and that the defendant was brought to the room where the examination was held and that he made the examination and questioned the defendant to ascertain the truth in regard to his claim of insanity. After detailing the physical examination and the conversation had by him with the defendant he testified "Neither in the account he gave of himself or his history, nor in his appearance nor as the result of my physical examination was there any evidence that he was an epileptic." He was then asked the hypothetical questions which were propounded to and answered by Dr. McDonald and he gave substantially similar answers. He further testified that a person has no memory of anything that occurs during a psychic or epileptic seizure. The attacks of the defendant's mother were described to him and he said they were not epileptic, but that they were hystero convulsions without the characteristics of epilepsy.

All of the questions relating to the defendant's guilt and responsibility for the crime were submitted to the jury by the court with a charge in which every request made by the

defendant's counsel was granted, and to which no exception was taken, except in one unimportant particular, and they have found against him. Although it is not contended by the defendant's counsel that the evidence, if properly received, is not sufficient to sustain the verdict, we have, in view of the serious consequences to the defendant, reviewed the evidence to show that it is not only sufficient to sustain the verdict, but that there can be no reasonable doubt that the homicide was committed by the defendant, and that he knew the nature and quality of the act he was doing, and that the act was wrong. (Penal Code, section 21.) The jury could have found that the defendant took the iron bar to the apartment for the purpose and with the intention of using it in committing the crime. Deliberation and premeditation are shown in his providing himself with the iron bar, and in the nature and number of the wounds inflicted upon Mrs. Keeler. (*People v. Totterman*, 181 N. Y. 385.) His need of money, as well as his confirmed smoking habit are shown by evidence that while at the poolroom, he was accustomed to gather the discarded ends of cigarettes and lay them away to smoke at times when he did not have money to buy cigarettes, or tobacco with which to make them.

There can be no sufficient motive for so brutal and serious a crime, but sometimes a comparatively trivial thing is magnified to such an extent that to accomplish or attain it a person will deliberately take human life. The robbery and larceny by the defendant do not seem to have been an afterthought, but a part of the purpose for which he entered the apartment, and the jury could have found the verdict based upon the deliberation and premeditation with which Mrs. Keeler was killed, and also upon the defendant's commission of the crime while engaged in a robbery and larceny affecting the person of Mrs. Keeler. The defendant's full consciousness of his acts in committing the crime is shown in the detail with which it was done; his taking the earrings and finger rings from his victim's person; the search of the house for other property upon which to secure money; his locking

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the doors and carrying the key away with him; his showing the blood stains on his trousers, that could not be removed like the blood on his hands; his statement to the young man in the poolroom that he had "got to get some money;" and to the manager of the poolroom that "you will read about it in the papers to-morrow;" his pawning the property stolen; his avoiding the police for five days, and his knowledge that he would be arrested as soon as he returned to his old haunts. The claim of his counsel that the crime was committed while affected by epileptic furor, or mental epilepsy, has absolutely nothing on which to rest.

The uncontradicted testimony is that when a person commits a crime under the influence of such furor, or mental epilepsy, he is not guided by intelligence or affected by motive, but the act is carried out wholly under the influence of such furor and without any recollection whatever of what thus occurs. All of the testimony relating to the act shows intelligence and knowledge, and his full recollection of the facts and deliberate effort to enjoy the fruit of his crime are convincing evidence of responsibility for the crime.

The only exceptions taken by the defendant that are urged before us relate to the examination of the defendant by Dr. Flint during one of the adjournments of the court, while the defendant was on trial, and also to the subsequent testimony of Dr. Flint, in which he related to the jury the conversation which he had with the defendant, and described what he found upon a physical examination. It is claimed in behalf of the defendant that such examination was obtained by entrapping the defendant, and that it was generally unfair and prejudicial to him, and that he was thereby compelled to give testimony against himself in violation of his constitutional rights, and also that unsworn statements by the defendant as to acts at a date prior to the time of the examination cannot be used as a basis on which to express an opinion as to the defendant's sanity at the time of the homicide.

The record does not disclose any justification for the claim that Dr. Flint was used to entrap the defendant into making

a statement for use against him on the trial. There is no denial of the testimony that Dr. Flint examined the defendant after being told that it was requested by the court, and that the examination was made without the knowledge or presence of either counsel. We are not to pass upon the question whether due courtesy was shown to the counsel engaged in the trial in holding the examination without notifying them.

The fact that several of the questions to and answers by the defendant were read from the minutes of the stenographer after the witness had sworn that the questions were so put to the defendant and answered by him, instead of the witness giving separately each question and answer from his unaided memory, or after refreshing his recollection, was not error or even a subject for criticism in the absence of any claim by the defendant's counsel at the time that such course should not be pursued.

The defendant was distinctly told that he might decline to answer any questions that were put to him, and that anything that he said in answer to questions might be used against him. It has been held by this court that where an under sheriff wormed himself into the confidence of a prisoner charged with murder, by making him believe that he was his friend and that he wished to help him, and thus by gross deception, but without threats, persuaded him to make disclosures, that such disclosures can be received in evidence. The test is whether the prisoner had any inducement to tell a falsehood against himself or felt compelled to speak for any reason when he preferred to remain silent. (*People v. White*, 176 N. Y. 331.)

The statement made to Dr. Flint was not within the Constitutional prohibition against compelling a defendant to give testimony against himself. (*People v. Truck*, 170 N. Y. 203; *People v. Gardner*, 144 N. Y. 119; *People v. Van Wormer*, 175 N. Y. 188; *People v. Mills*, 178 N. Y. 274; *People v. Adams*, 85 App. Div. 390; *affd.*, 176 N. Y. 351; *affd.*, 192 U. S. 585.)

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The statement made by the defendant was properly received in evidence as an admission or for the purpose of showing that defendant's statements made at different times were contradictory and inconsistent. (*People v. Hughson*, 154 N. Y. 153.)

The evidence was not incompetent because of the fact that the witness was a physician. (*People v. Hoch*, 150 N. Y. 291; *People v. Koerner*, 154 N. Y. 355.)

The authorities cited by the appellant to show that unsworn statements by the defendant as to transactions prior to the time of the trial cannot be given in evidence for use on which to base an expert opinion as to the sanity of the defendant at the time of the commission of the crime all relate to testimony offered in behalf of the defendant. Such testimony if allowed would permit a defendant to prepare his statement to fit his particular case. The reason for excluding testimony so offered in behalf of the defendant does not apply where it is sought to show conversations and statements of a defendant for use on a trial in behalf of the people.

We do not find any error in the record, but a commendable care and consideration for the rights of the defendant.

The judgment of conviction should be affirmed.

EDWARD T. BARTLETT, J. (dissenting). On the fifth day of the trial and during the noon recess, while the district attorney was putting in his proofs in rebuttal, Dr. Flint, a distinguished mental expert, was permitted to examine the defendant without the knowledge of his counsel and in the presence of Dr. McDonald and one other person. Dr. Flint testified: "I examined the defendant, as I said before, between one and two yesterday afternoon in the presence of Dr. McDonald and in the presence of the stenographer and one other person, I think." Under cross-examination Dr. Flint stated: "I was told that I was ordered or authorized to examine the defendant by the court, and that the defendant was brought up for examination. It may have been a court attendant. I do not remember who told me that. * * *

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I do not know who told me to go there. Some one told me that the defendant was to be brought to a room and I was to examine him."

The fair inference from this and other testimony in the case is that this hasty examination during the noon recess was at the instance of the district attorney and in the presence of a stenographer furnished by him to expedite matters. There was of course no objection to Dr. Flint examining the defendant at the request of the district attorney. It is also clear that the expert was at liberty, after having cautioned the defendant, as he did, that he was not obliged to answer any question asked him unless disposed to do so, as it might be used against him, to have propounded to him such interrogatories as he deemed essential in order to pass upon the question of his condition as to insanity, epilepsy or other mental malady.

This course, in part, the expert pursued, and he was thereafter placed upon the stand and examined by the district attorney at the outset in the usual manner. Dr. Flint stated that he had asked various questions of the defendant, going into detail as to the character of many of them. He was then required to answer two lengthy hypothetical questions, after which he stated his opinion as to the mental condition of the defendant at the time of the homicide. The counsel for the defendant then cross-examined the witness. There had been no departure up to this point from the usual practice in the examination of expert witnesses as laid down by many cases in this court, some of which appear upon the briefs and in the prevailing opinion.

The district attorney then continued his examination of Dr. Flint on the redirect. He held in his hand certain stenographic minutes which the witness testified were a correct transcript of a portion of his examination of the defendant. The defendant's counsel had previously objected and excepted to the entire examination of the defendant by the expert on the ground that it was in violation of the defendant's constitutional rights and an extra judicial examination. The ques-

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tion of objection and exception is of no importance on the present appeal. When the stenographer's minutes were produced as above stated, the defendant's counsel took the additional objection and exception that the conversation with the defendant was not in a form to be produced upon the trial. The district attorney then asked: "Did you ask him the following question and did he so answer as I shall read?" Thereupon for nearly three pages of the printed record the district attorney repeated the above question before reading each question and answer and received an affirmative reply from the witness. These answers, in the main, were highly prejudicial to defendant.

I venture to say that there is no case in this state, or in any jurisdiction under the common law, where such a practice has been sanctioned. It was of course competent, as I have before stated, for the expert to propound such questions to the defendant as he saw fit and base his opinion thereon. It was also proper when the expert was on the stand for counsel upon either side to examine him in detail as to the questions he propounded and the replies elicited. In other words, his memory could be thoroughly searched and tested on direct and cross-examination. The production of pages of stenographic minutes, read to the witness by separate question and answer as stated, is to lead the witness and relieve him from any effort to reproduce his examination of the defendant by the usual act of memory to which witnesses are subjected entirely unassisted by stenographer's minutes. The effect upon the jury of reading the stenographer's minutes in their presence was equivalent to placing the defendant upon the stand and compelling him to testify against himself.

If a portion of the examination made by the expert can be read from the stenographer's minutes, it follows that the entire examination may be embraced in the minutes and so read. It is impossible to draw the line.

It appears that the defendant was destitute of means and counsel was assigned him by the court. His sole defense was insanity or mental unsoundness. He had no money with

which to employ experts, and was, consequently, wholly dependent upon such lay witnesses as he could produce capable of testifying as to his mental condition. The homicide in question was either a brutal, motiveless murder, or the act of an irresponsible man; there is no middle ground. I do not mean to intimate that either the distinguished alienist or the learned district attorney were impelled by improper motives, but I insist that the mode of proceduro here disclosed was illegal, irregular and highly prejudicial to the rights of the defendant.

I vote for reversal and a new trial.

CULLEN, Ch. J., GRAY, O'BRIEN, WERNER and HISCOCK, JJ., concur with CHASE, J. EDWARD T. BARTLETT, J., reads dissenting opinion.

Judgment of conviction affirmed.

THE CITY OF ROCHESTER, Respondent, v. ROCHESTER RAILWAY COMPANY, Appellant, Impleaded with Another.

1. TAX — ROCHESTER (CITY OF) — WHEN CITY, IN ACTION TO FORECLOSE TAX LIEN FOR CERTAIN TAX, CANNOT RECOVER DEFICIENCY JUDGMENT FOR OTHER UNPAID TAXES ON SAME PROPERTY. In an action brought by the city of Rochester, under its charter (L. 1861, ch. 143, as amd. by L. 1880, ch. 14, and L. 1897, ch. 784), to foreclose the equity of redemption in certain premises upon which a tax had been regularly assessed and the property duly sold for the non-payment of such tax, the city cannot, under an allegation in its complaint setting forth a general description of other taxes due from the taxpayer whose property was so sold, recover a deficiency judgment for the aggregate amount of such unpaid taxes, with interest, where there is no allegation that any steps had been taken to collect the same, and the charter contains, among its provisions for the sale of property for taxes and the redemption thereof, no provision which authorizes a judgment for a deficiency for uncollected taxes, where no steps have been taken, under the provisions of the charter, for the collection thereof.

2. SAME — FAILURE TO COMPLY WITH CHARTER PROVISIONS FOR COLLECTION OF TAXES — WHEN SUCH FAILURE NOT CURED BY STATUTE (L. 1903, CH. 522) AND JUDGMENT FOR DEFICIENCY AUTHORIZED THEREBY. The city is not relieved from the necessity of complying with the provi-

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sions of its charter regulating the collection of taxes, as a condition precedent for a deficiency judgment for such unpaid taxes, by the curative statute relating to the collection of taxes (L. 1906, ch. 522), which provides, in substance, that all taxes heretofore spread upon the assessment rolls of such city may be collected either by action or by supplementary proceedings, or by foreclosure of tax liens, and that such remedies shall be in addition to the other methods provided in the charter for the collection of taxes, and not dependent upon them, or any of them, since such curative act, as heretofore construed and limited, does not authorize the foreclosure of all tax liens without compliance with the provisions of the charter, but merely validates certain taxes void for specified omissions in the method of assessing and levying the same, notwithstanding such omissions, and authorizes the foreclosure of such taxes upon that changed condition of affairs.

City of Rochester v. Rochester Ry. Co., 109 App. Div. 638, modified.

(Argued December 5, 1906; decided January 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 14, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

P. M. French for appellant. The general city taxes are not debts; they are not founded on contract, and the city being afforded by its charter a complete system for assessment, levy and collection of taxes, is confined to that system. It can maintain no action at law to recover of the taxpayer the amount of the general city tax. The remedy provided by the charter is exclusive. (Cooley on Taxation [2d ed.], 16; *City of N. Y. v. McLean*, 170 N. Y. 387; *City of Rochester v. Bloss*, 185 N. Y. 42.) After the amount of a local assessment has been added to the general city tax no action for its collection will lie. The remedy provided by the charter is exclusive. (L. 1897, ch. 784, § 209; *Matter of Fayerweather*, 143 N. Y. 114; *People v. Miller*, 177 N. Y. 51; *Matter of Wolfe*, 89 App. Div. 349; 179 N. Y. 599; *City of Rochester v. F. W. Assn.*, 183 N. Y. 30; *City of Rochester v. Bloss*,

185 N. Y. 42.) The power of the court to give a judgment for deficiency, if it exists at all, is confined to the tax which has become a "tax lien" by reason of service of notice to redeem and of the record of the mayor's certificate in the county clerk's office; that is, in this case to the tax for the year 1897. (*City of Rochester v. F. W. Assn.*, 183 N. Y. 23.) After a sale by the city treasurer to the city and the issuing and recording of the mayor's certificate under section 104, the title is certainly changed from the former owner and becomes vested absolutely in the city. The only remedy then remaining amounts to a strict foreclosure. (*Matter of Elsner*, 86 App. Div. 207; *Whitney v. Thomas*, 23 N. Y. 281; *Cottle v. Carey*, 73 App. Div. 54; 173 N. Y. 624; *Sanders v. Downs*, 141 N. Y. 422; *Moulton v. Cornish*, 138 N. Y. 133; *Thomas on Mortgages* [2d ed.], 1077; 3 Pom. Eq. Juris. § 1227.)

W. W. Webb, Corporation Counsel (*B. B. Cunningham* of counsel), for respondent. This action was properly brought to foreclose the lien of the tax for the year 1897. (*City of Rochester v. F. W. Assn.*, 183 N. Y. 23.) The only defense interposed upon the trial of this action and raised in the Appellate Division was that the city had no right, after it had sold the premises in question for taxes, to levy further taxes against appellant as the owner of said premises. It is well settled that a tax sale does not cut off the owner's right to redeem and that, therefore, taxes should be levied against him until his interest in the land is absolutely cut off. (*Clementi v. Jackson*, 92 N. Y. 591; *Finnegan v. Mayor*, 4 App. Div. 15; *People ex rel. Atkins v. City of Buffalo*, 63 App. Div. 563; *Armstrong v. County of Nassau*, 101 App. Div. 116.) The city of Rochester at the time judgment was rendered in this action was authorized by statute to collect by action all taxes previously levied, and a court of equity will always grant the relief to which the plaintiff is entitled at the time of the trial of the action. (*City of Rochester v. Bloss*, 185 N. Y. 42; L. 1880, ch. 14, § 206; *Matter of Elsner*, 86

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App. Div. 207; *Butts v. City of Rochester*, 1 Hun, 598; *McLean v. Myers*, 134 N. Y. 480; *M. A. B. Church v. O. S. B. Church*, 73 N. Y. 82; *Sammons v. City of Gloversville*, 175 N. Y. 346; *Dammert v. Osborn*, 140 N. Y. 30; *Kilburn v. Bd. of Supers.*, 137 N. Y. 170; *Warnier v. Boessneck*, 5 App. Div. 240.)

EDWARD T. BARTLETT, J. This action is brought to foreclose the equity of redemption of defendant railway company in a certain lot of land sold by plaintiff, the City of Rochester, on a tax sale by the city treasurer, the municipality having bid in the property.

In the year 1897 a tax for general city purposes, amounting to \$2.78, was assessed upon the property in question. This appeal involves the construction of certain provisions of the old charter of the city of Rochester read in connection with the so-called curative statute relating to taxes in said city. (Laws of 1903, Chap. 522.)

The complaint sets forth in detail compliance with the statutory requirements permitting a foreclosure of the equity of redemption remaining in the defendant after the sale in the proceedings to collect the tax of 1897. The defendant admits the regularity of the proceedings and the resulting judgment so far as the tax of 1897 is concerned.

The question presented by this appeal arises over the following allegation of the complaint: "That in addition to the tax for which the said premises were sold to the plaintiff, there are now due to the plaintiff on the said premises taxes as follows: General city tax, 1902, \$39.50; 1901, \$40.38; 1900, \$115.78; 1899, \$108.70; 1898, \$2.89; 1896, \$2.89; balance on Thrush street asphalt assessment, \$239.64; together with interest thereon as provided by law."

It will be observed that the only allegation respecting these taxes is that "there are now due to the plaintiff on the said premises," the taxes as stated.

No witnesses were sworn at the trial; both parties introduced various papers from the official files; judgment was

thereupon entered in the usual form foreclosing the equity of redemption as to tax of 1897, after which it was provided as follows: "That he (the owner) pay to the plaintiff the sum of \$731.47, the amount due to the plaintiff upon the tax liens mentioned and described in the complaint herein, take a receipt therefor and file his report of sale; that the treasurer of the City of Rochester apply the money so received upon the city tax in the inverse order of the levy and assessment thereof."

We thus have presented the single question whether the city, in foreclosing the equity of redemption in premises upon which a tax has been regularly assessed and the property duly sold can set forth in the same complaint a general description of certain taxes due the city from the taxpayer whose property was so sold and recover a judgment for the deficiency for the aggregate amount of said taxes, with interest.

It is unnecessary to examine in detail the provisions of the old charter, which must be observed in order to permit, ultimately, a sale where the city acquires title and afterwards forecloses the equity of redemption. It is neither alleged nor argued in respect to the taxes represented in the deficiency judgment that any steps have been taken to collect the same.

It is urged that the curative act of 1903 (*supra*), when construed with the provisions of the old charter, authorizes the judgment for the deficiency. Sections 94 to 104 of the old charter contain, substantially, the provisions which result in a sale and foreclosure of the equity of redemption. Sections 94 to 99, both inclusive, contain the provisions for the sale of the property, which need not be examined at this time. Under sections 100 and 101 the owner or claimant of the premises sold is allowed two years following the sale to redeem the same within thirty days after due notice served. Section 104 provides, in substance, that if the premises are redeemed within the time specified, a certificate of the fact shall be filed releasing the same. If, however, more than thirty days elapse and the premises have not been redeemed, the mayor of the city is required to execute a certificate of the fact of

the sale having been made, and the lands struck off to the city, and that the same have not been redeemed, which certificate shall be acknowledged as deeds to be entitled to be recorded, and shall be recorded in the Monroe county clerk's office. The city thereupon acquires an absolute title to the premises in fee. At any time after said certificate is executed, the equity of redemption of all persons having any lien or interest in the premises may be foreclosed by an action to be brought by the city in the Supreme Court, County Court of Monroe county, or the Municipal Court of the city of Rochester, and the proceedings to be had are to be conducted as nearly as may be as on the foreclosure of real estate mortgages, and judgment of strict foreclosure or foreclosure and sale may be had therein as the court may direct.

It is clear that there are no provisions in this scheme of sale and redemption of the property which authorizes a judgment for the deficiency for uncollected taxes concerning which no steps have been taken under the above provisions of the charter.

It is urged, however, that the provisions of the curative act (*supra*) permit such a recovery. Section three of said act provides as follows: "All taxes heretofore spread upon the assessment rolls of the various wards in the city of Rochester, may be collected by the corporation counsel, either by action, or by supplementary proceedings, or by foreclosure of tax liens, without regard to the date when the said taxes were so spread, and the Statute of Limitations cannot be interposed as a defense thereto. The remedies herein provided shall be in addition to the other methods provided in the charter of the city of Rochester for the collection of taxes in the said city of Rochester, and not dependent upon them, or any of them. No certificate of the mayor of the said city of Rochester, made by said mayor under section 104 of the charter of said city, of failure to redeem lands sold for taxes, now or hereafter recorded in the office of the county clerk of Monroe county, shall be discharged until all city taxes which are a lien upon the premises described in said certificate, shall have been

paid. Notice to redeem from sale for taxes, may be served at any time after the expiration of two years from the date of said sale. Upon the foreclosure of tax liens in actions brought in the Supreme and County Courts, all taxes due the city of Rochester may be included in the action of foreclosure and be satisfied from the proceeds of sale of the premises. Where several lots or parcels of land are owned by the same person or persons, distinct tax liens upon the separate lots and parcels of land so owned may, at the option of the city of Rochester, be foreclosed in one action, and actions now pending may be consolidated, in the discretion of the court, upon such facts being shown."

The curative act was construed by this court in *City of Rochester v. Fourteenth Ward Co-op. B. L. Association* (183 N. Y. 23). The object of that action was to foreclose a tax lien upon lands in the city of Rochester pursuant to the provisions of the charter and certain special acts relating to that city. In that case there had been a failure to serve a notice to redeem upon the owner. It was argued on behalf of the city of Rochester, appellant, that the service of such a notice was unnecessary in view of the provisions of the curative act. Judge VANN, writing for the court said (p. 29): "It is contended in behalf of the city, although the action was not brought on that theory, that the object of this curative act was not only to correct all irregularities and omissions in the assessment of taxes and in the proceedings to collect the same, but to provide new remedies for the collection of taxes wholly independent of the methods provided by the charter. It is claimed that neither a sale by the city treasurer need be made, nor any notice to redeem given, in order to foreclose a tax lien. It may be that the statute admits of this construction, but before we conclude that the Legislature intended to provide such a harsh and oppressive remedy we should study the act with diligence to see whether another construction, less severe upon the owner and equally effective, is not reasonable and practicable."

The opinion then argues at length this question of con-

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struction, and continues (p. 31) as follows: "The learned counsel for the appellant, in order to justify the construction he contends for, relies especially upon the following sentence, which appears in the curative act almost in direct connection with the provision relating to the service of a notice to redeem: 'The remedies herein provided shall be in addition to the other methods provided in the charter of the city of Rochester for the collection of taxes in the said city of Rochester, and not dependent upon them, or any of them.' This seems plain when read by itself, but it is not plain when read in connection with the old charter. The remedy of foreclosure was not an additional remedy, because it had already been provided. The foreclosure authorized by the old charter, however, depended upon what had actually been done by the mayor, treasurer and other officers of the city when their acts were effectual to the validity of the tax."

After further discussion the opinion states (p. 32) as follows: "We are also of the opinion that the 'foreclosure of tax liens' authorized by the curative act means the liens created by the record of the list of lands sold in the county clerk's office, and not the liens created by the levying of the tax by the common council. When the lien becomes a matter of record in the office which contains a history of all titles in the county it is dignified in the statute by the name of a tax lien, which may be foreclosed in a court of record the same as a mortgage lien when a mortgage is recorded in that office. It is, however, argued that according to the curative act an action at law may be commenced to recover the amount of the taxes as soon as it becomes due, without any sale by the treasurer, and that this remedy is nearly as severe as an action of foreclosure. If this is so, and we are not now required to pass upon the question, it does not follow that the legislature intended to give two drastic remedies, each involving an imposition upon the taxpayer of costs out of all proportion to the amount of the taxes, instead of one. We have reached the conclusions announced not without hesitation, for whatever construction is adopted serious difficulties are encoun-

tered. The real meaning of the legislature is not clear, but all doubts as to the construction of a taxing statute are to be resolved in favor of the taxpayer, and we resolve those doubts in this case by affirming the judgment appealed from with costs."

This decision is controlling; indeed, the facts now presented are much less favorable to the city than in the case cited, for it is not alleged in the complaint that any steps had been taken to collect the taxes represented in the deficiency judgment.

We are not required to pass upon other, and possibly difficult questions, presented by the involved provisions of the curative act and now urged upon our attention.

It, therefore, follows that so much of the judgment entered in this action as forecloses the equity of redemption under the sale in proceedings relating to the taxes of 1897, with interest and notice, amounting at the time of the decree to \$6.33, and costs, is regular; but the provision in the judgment that the owner pay to the plaintiff the sum of \$731.47, the amount due to the plaintiff under the tax liens mentioned and described in the findings, should be reduced to the sum of \$6.33, the amount due on the tax sought to be foreclosed, and a deficiency judgment should be awarded only for said sum, together with interest, costs and allowances, and the judgment as so modified is affirmed, without costs to either party in this court.

CHASE, J. (dissenting). I dissent and briefly state my reasons therefor. In the case of *City of Rochester v. Fourteenth Ward Co-op. B. L. Assn.* (183 N. Y. 23) the plaintiff wholly failed to sustain any cause of action. In the case now before us it is conceded that the action was properly brought.

The defendant admits the regularity of the proceedings and the resulting judgment so far as the tax of 1897 is concerned. The curative act, chapter 522 of the Laws of 1903 in section 3, provides: "Upon the foreclosure of tax liens in actions brought in the Supreme and County courts, *all taxes due the City of Rochester may be included in the action of*

foreclosure and be satisfied from the proceeds of the sale of the premises."

Under this provision of the statute the taxes subsequent to 1897 were properly set forth in the complaint, that the amount thereof might be determined in the action and paid from the proceeds of sale. If the property had sold for a sufficient amount to pay the taxes due the city of Rochester they could by the express terms of the statute have been satisfied from such proceeds of sale.

The curative act also provides for the collection of all taxes by action and the charter, section 104, chapter 14, Laws of 1880, provides, "That in an action to foreclose a tax lien the same proceedings shall be had as nearly as may be on the foreclosure of mortgages."

Equity, having acquired jurisdiction of the parties and of the subject-matter of the action, should retain it for all purposes, and render judgment in the action for deficiency as in an action to foreclose a mortgage.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur, with EDWARD T. BARTLETT, J. CHASE, J., reads dissenting opinion.

Judgment accordingly.

CONTINENTAL INSURANCE COMPANY et al., Appellants, v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al.,
Respondents.

1. CORPORATIONS — AGREEMENT BETWEEN TWO RAILROAD CORPORATIONS COMPROMISING DISPUTE AS TO WHICH WAS ENTITLED TO SAVING IN INTEREST ARISING FROM REFUNDING OPERATIONS. In an action brought by minority stockholders of the New York and Harlem Railroad Company (the company upon request having declined to bring it) to have declared null and void a compromise agreement made with the New York Central Railroad Company with respect to a division of the amount of interest saved by the refunding of the bonded indebtedness of the Harlem Company at a lower rate of interest, both parties having claimed to be entitled to the whole amount, it appeared that the dispute between

the companies arose over the construction of the terms of a lease of the Harlem railroad to the Central Company; eminent counsel differed in their construction; a suit had been instituted by the Central Company and also by a stockholder of the Harlem Company to determine the questions involved; under these circumstances an amicable adjustment of the controversy was deemed advisable, and the directors of each of the contracting parties, a majority of whom were directors of both companies, entered into the agreement in question, substantially dividing the amount saved in interest between the two companies; the agreement was thereafter ratified by the stockholders of both companies; notwithstanding the ratification the agreement was not executed by the Harlem Company until the Central Company upon demand had indemnified the former for its action; thereafter the Central Company discontinued its suit and secured a discontinuance of the stockholders' suit by transferring certain stock to the plaintiff therein; it was affirmatively found that the dispute between the two companies was an honest one and was in good faith compromised and "that there was no combination, conspiracy, and no fraud." *Held*, that although by the terms of the original lease the Harlem Company was entitled, if it could procure the necessary funds, to pay off the bonds and secure to itself any advantage in the reduction of interest arising from a new loan, that nevertheless the compromise agreement was binding on both parties thereto and concluded the rights of the plaintiffs.

2. COMPROMISE AGREEMENT VOIDABLE, NOT VOID. Assuming that the fact that the majority of the directors of the Harlem Company were directors of the Central Company rendered the agreement voidable at the election of the Harlem stockholders, it was not absolutely void, and having been ratified by them, became binding upon the company.

3. WHEN MINORITY STOCKHOLDERS NOT ENTITLED TO MAINTAIN ACTION. The right to avoid the agreement, however, rested in the Harlem Company, not in minority stockholders, unless the ratification thereof was dictated by fraud or was procured by concealment and in ignorance of the true state of the facts, which it was affirmatively found was not the case here.

4. APPEAL—STIPULATION AS TO EVIDENTIARY FACTS DOES NOT ENABLE COURT OF APPEALS TO CONSIDER FINDINGS UNANIMOUSLY AFFIRMED. Whatever may be the force of a contention that the existence of issuable or traversable facts having been stipulated by the parties on the trial, the Court of Appeals is bound to accept and consider them, notwithstanding the findings have been unanimously affirmed by the Appellate Division it is not applicable to merely evidentiary facts, not necessary to allege or plead, but constituting only evidence from which the issuable or traversable facts can be determined, especially in a case where all the stipulated facts fail to establish fraud or misconduct on the part either of the directors or of the majority of stockholders.

5. ACTION OF COMMON DIRECTORS OF THE TWO CORPORATIONS. That the common directors of the two corporations asserted the rights of each, as the occasion required, is not a proper ground for criticism, that being the right thing to do.

6. WHEN CIRCULAR ALLEGED TO HAVE BEEN MISLEADING CANNOT AFFECT RESULT. A contention that a circular issued to stockholders calling the meeting to act on the proposed compromise agreement was misleading and insufficient is without force when not a single stockholder voting for the ratification has complained that he was misled or has sought to repudiate his action, where the controversy was of long duration and some public discussion and the plaintiffs at all times knew the exact situation.

7. SETTLEMENT OF LITIGATION DOES NOT ESTABLISH FRAUD. A settlement by the Central Company of the Harlem stockholders' suit and the exaction of indemnity by the Harlem Company, while showing that both companies were fearful of litigation, does not establish fraud.

8. SUFFICIENCY OF VOTE RATIFYING AGREEMENT. Assuming that the compromise agreement was in effect a new lease to be executed with the same formalities and vote as in the case of the original lease, under chapter 433 of the Laws of 1893, the vote of the Central Company's stockholders was sufficient, two-thirds of the stock voted upon at the meeting being cast in favor of the lease.

Continental Ins. Co. v. N. Y. & H. R. R. Co., 103 App. Div. 282, affirmed.

(Argued December 4, 1906; decided January 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1905, affirming a judgment in favor of defendants entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alton B. Parker, William C. Trull and Charles E. Miller for appellants. The Harlem Company had the right to issue the new bonds secured by a mortgage on its reversionary interest in the leased property, and to devote the proceeds of those bonds to the payment of the consolidated mortgage bonds at maturity. The second supplementary contract, therefore, was without consideration and void. (*Feeter v. Weber*, 78 N. Y. 334; *Farmers' Bank v. Blair*, 44 Barb. 641; *Miles v. Estate Co.*, L. R. [32 Ch. Div.] 266; *Sullivan*

v. *Collins*, 18 Iowa, 228; Pollock on Cont. 161.) The second supplementary contract is invalid for the reason that it was formulated, promoted and authorized in behalf of the Harlem Company, by directors of that company, a majority of whom were directors of the Central Company. (Morawetz on Corp. § 528; *N. Y. C. Ins. Co. v. Nat. Ins. Co.*, 14 N. Y. 85; *Voltz v. Blackmar*, 64 N. Y. 440; *Pearson v. C. R. R. Co.*, 62 N. H. 537; *Fitzgerald v. F. & M. C. Co.*, 44 Neb. 463.) The legal inferences which naturally flow from the referee's findings establish that the acts of the common directors in planning and authorizing the second supplementary contract amounted to constructive fraud. (*Bosworth v. Allen*, 168 N. Y. 157.) The second supplementary contract is so unjust and unfair in its provisions and so manifestly in the interest of the Central Company and against the interest of the Harlem Company, that, having been authorized by directors of the Central Company, who were at the same time directors of the Harlem Company, it is voidable at the suit of the plaintiffs. (2 Cook on Corp. § 658; 3 Thomp. on Corp. § 4079; Morawetz on Corp. § 528; *Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 58; *Met. Elev. Co. v. Man. El. Co.*, 11 Daly, 373; *Burden v. Burden*, 159 N. Y. 287; *Barr v. N. Y., L. E. & W. R. R. Co.*, 52 Hun, 555.) The vote of the stockholders of the Harlem Company in approval of the second supplementary contract is no obstacle to the maintenance of this action. (*Sage v. Culver*, 147 N. Y. 241; *C. C. Co. v. Sherman*, 30 Barb. 553; *Gilman, C. & S. R. R. Co. v. Kelly*, 77 Ill. 426; 2 Cook on Stock & Stockh. 945, § 662; *Gamble v. Q. C. W. Co.*, 123 N. Y. 91; *Crichton v. W. P. Co.*, 36 South. Rep. 926; *Jacobus v. A. M. W. M. Co.*, 38 Misc. Rep. 371; 94 App. Div. 366; *C. H. C. Co. v. Yerkes*, 141 Ill. 320; *Errin v. O. R. & N. Co.*, 27 Fed. Rep. 625; *McLeary v. E. T. T. Co.*, 38 Misc. Rep. 3; *Menier v. H. T. Works*, L. R. [9 Ch. App.] 350; *F. L. & T. Co. v. N. Y. & N. R. Co.*, 150 N. Y. 410.)

William B. Hornblower, Francis Lynde Stetson, Henry B. Anderson and Ira A. Place for respondents. The con-

tention that the single circumstance that a majority of the two boards was composed of the same individuals, of itself precludes the making of any contract between the two companies and prevents the compromise agreement from having any force or effect is absolutely at variance with the well-settled rules of law and equity. (2 Pars. on Cont. [9th ed.] 505, 661; *Dady v. O'Rourke*, 172 N. Y. 452; *Holmes v. Hubbard*, 60 N. Y. 185.) Even had it been true that the compromise agreement had been adopted by a vote of the directors of the Harlem Company, of whom a majority were directors of the Central Company, the agreement would not, therefore, have been invalid but merely voidable at the option of the company, which option must be exercised promptly. (*Wallach v. L. I. R. R. Co.*, 12 Hun, 463; *Gamble v. Q. C. W. W. Co.*, 123 N. Y. 99; *McNaughton v. Osgood*, 41 Hun, 109; *Burden v. Burden*, 8 App. Div. 160; *Leslie v. Lorillard*, 110 N. Y. 532; *M. E. Ry. Co. v. M. Ry. Co.*, 11 Daly, 373; *People v. R. S. & L. Assn.*, 97 App. Div. 31; *Burden v. Burden*, 159 N. Y. 287; *Hart v. O. & L. C. R. R. Co.*, 89 Hun, 317; *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 127.) The compromise agreement was ratified by an overwhelming vote of stockholders at a meeting duly called for that purpose. Such ratification eliminated any objection to the contract based upon the fiduciary relationship of the directors growing out of their common directorship in the two companies. (*Gamble v. Q. C. W. Co.*, 123 N. Y. 91; *Hodge v. U. S. S. Co.*, 54 Atl. Rep. 1; *N. W. T. Co. v. Beuttie*, L. R. [12 App. Cas.] 589; *Burland v. Earle*, L. R. [1 App. Cas. 1902] 83; *Bjornsgaard v. G. Co. Bank*, 49 Minn. 483; *S. M. M. Co. v. Preston*, 17 Misc. Rep. 220; *Windmuller v. S. D. & D. Co.*, 114 Fed. Rep. 491; 115 Fed. Rep. 748; *M. E. R. R. Co. v. Man. R. Co.*, 11 Daly, 516.) The overwhelming vote of the stockholders in favor of the compromise was given with full knowledge of all the material circumstances of the case and is conclusive upon the Harlem Company, and none of plaintiffs' objections to the same are well taken. (*Symott v.*

C. B. L. Assn., 117 Fed. Rep. 379; *P. L. Co. v. Green*, 7 C. P. 43; *Kelly v. N. H. R. R. Co.*, 141 Mass. 496; *Gale v. Morris*, 3 Stew. 285; *Haslett v. Stephany*, 55 N. J. Eq. 68; *May v. Chapman*, 16 M. & W. 355; *Higgins v. Crouse*, 147 N. Y. 411.)

CULLEN, Ch. J. In April, 1873, the defendant, The New York & Harlem Railroad Company, entered into an agreement with the defendant, The New York Central Railroad Company, whereby it demised that part of its railroad which was theretofore operated by steam power, together with the rolling stock used thereon, and which lay north of Forty-second street in the city of New York, to the latter company for the term of four hundred and one years; the lessee yielding and paying therefor to or on account of the said party of the first part (the Harlem Company) during the continuance of said demised term an annual rent to be paid as follows:

“*First.* By paying to the several stockholders in the said party of the first part, semi-annually, on each first day of July and first day of January, or whenever thereafter it shall be demanded, two dollars per share upon each share of its capital stock held by them, respectively, at the time of closing the transfer books as hereinafter provided; such two dollars per share being equal to eight per centum per annum on the par value of such capital stock.

“But, in order to fairly adjust the first payment so to be made by the said party of the second part under this article, with reference to the date of the taking effect of this contract and the time of making such first payment, the said party of the first part covenants and agrees that it will, on or before the thirtieth day of June, one thousand eight hundred and seventy-three, pay to the said party of the second part the sum of one hundred and eighty thousand dollars (\$180,000), being equal to one dollar per share on the amount of its capital stock now outstanding, and equal to the part of eight per centum per annum thereon, that would accrue between the first day of January, one thousand eight hundred and seventy-three (when

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the last dividend was paid thereon), and the first day of April, one thousand eight hundred and seventy-three (when this contract takes effect.)

"*Second.* By paying the interest on the bonds of the said party of the first part, as described in the schedule hereto annexed marked 'A,' according to the conditions of said bonds, respectively, and as such interest shall, from time to time, become due and payable and shall be demanded.

"But, in order to fairly adjust the first payment of interest, to be made by the said party of the second part, on each kind of bonds mentioned in the said schedule, with reference to the date of the taking effect of this contract, the said party of the first part covenants and agrees that it will, on or before the day on which the first interest shall, ensuing the date hereof, become due and payable on any of the bonds described in the said schedule, pay to the said party of the second part an amount equal to the amount of interest accrued in each case between the date of the last payment of interest on such bonds and the first day of April, one thousand eight hundred and seventy-three :

"It being mutually covenanted and agreed that the payments to be made under this and the previous subdivision of article first may be in the 'Consolidated Mortgage' bonds of the said party of the first part, hereinafter mentioned, which bonds, so paid to the said party of the second part, may be used by it for its own sole and separate use and benefit :

"It being further mutually covenanted and agreed that the amounts outstanding of the said capital stock, and of the said bonds described in said schedule 'A,' are subject to the provisions of the third and fourth articles hereof as to an increase of each, and as to the payments to be made by the said party of the second part upon such increase of each, if, and when made.

"*Third.* And by paying the rent agreed to be paid by the said party of the first part to the New York and Mahopac Railroad Company, according to the terms and conditions of the lease hereinbefore referred to."

At the time of the lease the authorized capital of the Har-

lem Company was ten millions of dollars, of which two millions in amount were unissued. Previous to that time it had executed a mortgage to secure the payment of twelve millions of dollars of so-called consolidated bonds, which would mature May 1st, 1900. Of these bonds a certain amount had been issued, another amount was held to replace underlying mortgages on the road and the remainder was unissued. By the terms of the agreement the unissued stock and bonds were to be turned over to the Central Company to be sold and disposed of, and the proceeds to be applied to the betterment of the railroad, including the acquisition of any new property, the title to be taken in the name of the lessor. Under these provisions all the stock and bonds were outstanding long before the present controversy. The agreement contained the following provisions with reference to the payment or extension of the mortgage bonds as they might mature, and it is their construction which has given rise to the controversy between the parties.

"*Sixth.* The said party of the second part covenants and agrees that it will pay the principal of all the bonds described in said schedule 'A' other than the bonds therein described as 'Consolidated Mortgage, due May 1, 1900,' as they shall respectively mature and be presented for payment, and that it will, at the maturity thereof, pay the principal of the said 'Consolidated Mortgage' bonds if, and in case, it should not be paid by the said party of the first part.

"In case of the payment thereof, or of some or any part thereof, by the said party of the first part, then, and in that event, the said party of the second part shall thereafter pay to the said party of the first part, semi-annually, on the days when interest would become due and payable on said bonds, if the time thereof had been extended, an amount equal to such interest on said bonds, or on such part of them as may have been paid by the said party of the first part, so as fairly to adjust the obligations of the said party of the second part, herein contained, as to the annual rent on the said railroad and property herein demised.

"In case, however, the said 'Consolidated Mortgage' bonds shall be paid by the said party of the second part, the said party of the first part agrees that it will, whenever requested by the said party of the second part so to do, issue in lieu thereof new bonds bearing a similar rate of interest, or such other rate as may be agreed upon, with, so far as may be required, proper coupons or interest warrants therefor appended, and secured by a suitable mortgage upon the railroad property and franchises hereby demised; such bonds to be payable at such time or times, and to such person or persons as may be prescribed by the said party of the second part, and will deliver such new bonds to the said party of the second part, to be sold or disposed of in its discretion; in which case the obligation of the said party of the second part herein contained, with regard to the payment of interest on the said 'Consolidated Mortgage' bonds shall be deemed and held to apply to interest on such new bonds.

"And at the maturity of such new bonds the process herein provided for shall be repeated; and so on, as often as may be necessary, during the continuance of this contract."

At all times from January 1st, 1896, till after the commencement of this action seven of the thirteen directors of the Harlem Company were also directors of the Central Company. At the end of that year the Central Company contemplated a new issue of bonds and entered into negotiations with a firm of bankers for their sale. In connection with this negotiation there arose the question as to how the consolidated mortgage bonds of the Harlem Company were to be provided for at maturity, and the tender of the bankers was in the alternative, either to purchase the issue of Central bonds covering the Harlem property or to purchase with the Central bonds, bonds of the Harlem road to replace the consolidated bonds. At this time the rate of interest had so fallen that it was found possible to sell at par new bonds bearing interest at the rate of three and a half per cent per annum. The difference in the interest charge for the twelve millions of outstanding bonds and for the new bonds to be

substituted therefor would amount to four hundred and twenty thousand dollars annually, and the question seems to have immediately arisen as to which party, the lessor or the lessee, was, under the terms of the lease, entitled to this saving. Counsel for the Central Company advised that company that the reduction in interest inured solely to its advantage; counsel advised the Harlem Company that it, by negotiating a new mortgage, could pay off the consolidated bonds and secure to itself the reduction in the interest charge. One eminent counsel took still a different view and advised the Harlem Company, which was the owner of a street surface railway line on Fourth avenue, in the city of New York, with valuable depot and station lands, that if it could raise the necessary funds by the sale of such property it might pay off the consolidated bonds and thus secure the reduction in interest charge, but that under the lease it could not execute a new mortgage on the demised property and obtain the necessary funds by that means. The Central Company instituted a suit against the Harlem Company to compel that company to issue and deliver to the Central Company under the last provision of the 7th clause of the lease, new bonds and to have it declared that the Harlem Company had not the right to pay off the consolidated mortgage bonds in its own interest or on its own behalf. Answer was interposed in that suit and it remained at issue until the final contract between the two companies. A stockholder in the Harlem Company brought an action against that company and the Central Company to secure the rights of the Harlem Company and his own. This also remained at issue. The board of directors of the two companies met from time to time and considered the question at issue between them. The directors who were common to both companies supported the claim of the particular company as the directors of which they were at the time acting; that is to say, at the meeting of the Harlem Company they asserted the claim of that company; at the meeting of the Central Company they asserted the antagonistic claim of that company.

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Matters remained in this indefinite condition until June, 1898, when, at a meeting of the Harlem board of directors a committee composed of members of that board who were not directors of the Central Company, and only one of whom was a stockholder therein, was appointed to confer with a like committee on the part of the Central Company, none of whom were directors in the Harlem Company, for a settlement of the differences between the companies, and a resolution was passed that any agreement effected between the two committees should be submitted to the stockholders of the Harlem Company for their action thereon. Similar measures were taken by the board of directors of the Central Company. The two committees agreed on a compromise which, in substance, increased the dividends to be paid to the Harlem stockholders from eight per cent to ten per cent, and the Harlem Company relinquished all further claim on the Central Company. In other words, of the reduction in interest charge, amounting to four hundred and twenty thousand dollars annually, the sum of two hundred thousand was to go to the Harlem Company and two hundred and twenty thousand to the Central Company. The compromise agreement was submitted to a meeting of the Harlem stockholders held on October 5th, 1898, at which it was adopted by the vote of 146,519 shares, out of 157,561 shares participating at the meeting and a total of 200,000 shares outstanding. The agreement was also ratified by a meeting of the Central Company stockholders. Despite of this ratification the directors and officers of the Harlem Company failed to execute the compromise agreement until April, 1900, when they demanded that the Central Company indemnify them for their action. Such indemnity being given they executed the contract. The suit between the two companies was discontinued as was also the suit brought by the stockholder of the Harlem Company. To obtain a discontinuance of the latter suit the Central railroad paid to the plaintiff therein two hundred shares of Harlem stock. On June 29th, 1900, the plaintiff instituted this action, praying as relief that the compromise

agreement be adjudged void, and that by the payment of the consolidated mortgage bonds by the Harlem Company, that company was entitled to receive the full rent reserved in the lease, being the sum of \$840,000, the equivalent of 7% interest on twelve millions of the consolidated bonds. The action was referred to the Honorable Charles Andrews to hear and determine. After a trial, in which most of the evidence consisted of stipulated facts, the learned referee decided in favor of the defendants. The judgment entered on the report of the referee was unanimously affirmed by the Appellate Division of the first department, and from the judgment of the Appellate Division this appeal is taken.

The distinguished jurist before whom, as referee, this case was tried, was of the opinion that by the terms of the original lease the Harlem Company was entitled, if it could procure the necessary funds, to pay off the consolidated mortgage bonds and thus secure to itself any advantage in the reduction in the interest charged on its road. We think that in this view he was clearly right. By the first clause of the lease all payments to be made by the lessee were reserved as rent and by the second subdivision of the clause that rent was to be paid by paying certain specific interest charged to the holder of the bonds. This provision did not change the character of the payment, but merely the method of the payment. The payment was still to be of rent. By the second paragraph of the sixth clause it was expressly provided that in case of the payment of the bonds or any of them by the lessor, the lessee was to pay the lessor semi-annually, on the dates when interest would become due and payable, an amount equal to the interest thereon or such part as might have been paid by the lessor "so as fairly to adjust the obligation of the said party of the second part (Central Company) herein contained, as to the annual rent on the said railroad and property herein demised." In the written opinion given to the Central Company by its counsel it is merely stated that the requirement of the lease that the lessee should pay the interest on the outstanding bonds issued by the lessor was one of indemnity only. Not a reason

is given nor a word stated in support of such a claim. It is in direct contravention of the terms of the lease which declare the amount of such interest to be rent and make provision for the contingency of the payment, by the Harlem Company, of the bonds. It is contended, however, that as by the fifth clause of the lease the Harlem Company covenanted and agreed that it would not, during the continuance thereof, "authorize, create or issue any stock or bonds additional to the amounts thereof respectively, now authorized or outstanding, as hereinbefore stated," the company could not issue new bonds to raise funds wherewith to pay off the old bonds. The language of the lease does not justify any such construction. The covenant is not to refrain from issuing any bonds other than those outstanding at the time of the lease and specified in the schedule, but not to issue bonds "additional to the amounts" then outstanding. New bonds issued in substitution of the old bonds would not in any respect increase the amount outstanding. There is this further answer to be made to the claim of the Central Company. As held by the learned referee, any new mortgage bonds issued by the Harlem company without the consent of the Central Company, would be subject to the lease held by the Central Company, and that company, therefore, had no legal interest in the question whether the Harlem Company should mortgage its reversion or not. If the covenant is subject to the construction contended for by the Central Company it would be void and could not be enforced. Ever since the decision in *De Peyster v. Michael* (6 N. Y. 467) it has been the settled law in this state that a covenant restraining alienation by the owner of the property in fee is void, and that such a covenant can be supported only where the covenantee has a reversion in the property. The Central Company had no reversion in the demised property, but solely the demised term. It was said by Chief Judge RUGGLES in the case cited: "By the old feudal law the tenant could not alien his fee without the lord's license, and the lord could not alien his seignory without the tenant's attornment. * * * The feudal restraint was mutual; but when the feudal relation

between the parties was broken up, these feudal restraints were thereby dissolved, and the common-law principle applicable to property not feudal immediately took effect, and rendered similar restraints created by contract entirely void." But though in the original dispute between the two companies the Harlem Company was in the right, we further agree with the learned referee that the compromise agreement executed by the two companies in pursuance of the action of their stockholders was binding on both the parties thereto, and concluded the rights of the plaintiff.

Assuming that the fact that the majority of the directors of the Harlem were also directors of the Central rendered the agreement made by the two boards for an apportionment of the interest reduction between the two companies voidable at the election of the Harlem stockholders, as doubtless was the case, nevertheless the agreement was not absolutely void, but could be ratified by the action of such stockholders, in which case it would become binding upon the company. The right, however, to avoid a contract made by common directors is in the corporation, not in minority stockholders. (*Burden v. Burden*, 159 N. Y. 287.) In that case, speaking of minority stockholders, Judge BARTLETT said: "The plaintiff is in the position of all minority stockholders, who cannot interfere with the management of the corporation so long as the trustees are acting honestly and within their discretionary powers." As already stated, it was so ratified by an overwhelming majority, and the ratification is conclusive upon the parties unless the action of the majority of the stockholders was dictated by fraud or was procured by concealment and in ignorance of the true state of the facts. We concede to its fullest extent the rule which "requires of the majority of the stockholders the utmost good faith in the control and management of the corporation, and in this respect the majority stand in much the same attitude towards the minority that directors stand towards all the stockholders." (2 Cook Stock and Stockholders, sec. 662.) The safety of corporate investments depends on the maintenance of this principle in its fullest

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integrity. It was expressly affirmed by this court in *Farmers' Loan and Trust Company v. N. Y. & Northern Railway Company* (150 N. Y. 410). The difficulty, however, with the appellant's contention on this appeal is that the referee has affirmatively found that the dispute between the two companies was an honest one and was in good faith compromised, and "that there was no combination, conspiracy and no fraud." It is insisted for the respondents that these findings, having been unanimously affirmed by the Appellate Division, are conclusive upon this court. To this the appellant responds that the facts having been stipulated by the parties on the trial, this court is bound to accept and consider them, despite of any findings made by the trial court. It may be that the appellant's position is correct so far as the parties may have stipulated the existence of any issuable or traversable facts, and that the stipulation of the parties should be treated as supplementing or qualifying the pleadings, and thus narrowing the issues to be determined by the trial court. For illustration, in an action against an indorser on a promissory note the answer might deny demand and notice of protest. If on the trial the parties stipulated the existence of facts which, as a matter of law, constituted due demand and notice, it may very well be that a finding by the trial court that no notice of protest had been given would not be conclusive on this court, even though unanimously affirmed by the Appellate Division. But this principle cannot apply to what we may term merely evidentiary facts; that is to say, facts which it is not necessary to allege or plead, but constitute only evidence from which the issuable or traversable facts can be determined. We think that most, if not all, of the stipulated facts on which the appellant relies are of the latter character. However, we shall not attempt to differentiate, as we are of opinion that, considering all of them, they fail to establish fraud or misconduct on the part either of the directors or of the majority of the stockholders.

The learned counsel for the appellant lays stress on the inconsistent attitudes which the common directors of the two com-

panies at all times assumed. In the Harlem board they asserted the rights of that company; in the Central board, the rights of that company. We see no impropriety in this course of conduct. On the contrary, it seems to us to have been the right thing for these directors to do. They were large stockholders of each company, though as appears by the finding of the referee and by the stipulation of the parties showing the respective holdings of the common directors in each company, the pecuniary interest of those directors in the Harlem Company far exceeded, so far as the disposition of the controversy in suit is involved, their interest in the Central Company. They adopted the proper method to adjust the dispute when a committee was appointed from each board of directors, who had no interest in the other company, to negotiate a settlement and to submit that settlement to the stockholders of the companies. We do not think that the existence of this dispute necessarily required them to resign from either or both boards, for they had large interests of their own to protect which might be affected by many other matters than this particular controversy. It appears also that at all times a large majority of the stock of the Harlem Company was held by persons other than the directors, who could at any time choose another board if dissatisfied with the existing one. It is contended that the circular issued to the stockholders calling the meeting to act on the proposed compromise was misleading and insufficient. Of course, any circular that might have been issued would be subject to some criticism. Minds differ, and one person would suggest one change, one another. Not a single stockholder that voted for the ratification of the compromise has complained that he was in any way misled or has sought to repudiate his action. The controversy was of long duration and of some public discussion. As early as December, 1896, or nearly two years before the stockholders' meeting, the eminent counsel for the plaintiff, Mr. Trull, in an elaborate opinion, which is found in the case, had advised that company that the claim of the Central Railroad was without foundation and that the Harlem Com-

pany and its stockholders were entitled to the reduction in the interest charges on the road. The plaintiff at all times knew the exact situation of the controversy, and if it had any fears as to its co-stockholders being misled it could have apprised them of the true state of the case, if it deemed the circular insufficient in any respect. As already stated, out of a total of 200,000 shares (\$50 each), 157,561 were voted at the stockholders' meeting. Of these 146,519 were cast in favor of the compromise, and 11,042 against it. Of the 42,439 shares not voted, all but 11,653 shares have for years accepted the terms of the compromise. The common directors of the Harlem and of the Central Companies held 58,936 shares, which were cast for the compromise. If these are thrown out, nearly a hundred thousand shares would remain in favor of the compromise, or nine times the adverse vote. A computation based on their respective holdings in the two companies shows that all of such directors, with one exception, lost by the acceptance of the proposed compromise, of course, on the assumption that the Harlem claim was well founded. Cornelius Vanderbilt, the president, held 39,668 shares and William K. Vanderbilt 18,718 shares. The net annual loss of the former was \$40,224.80; of the latter, \$10,029.80, he having greater holdings than the other in the Central Company. The holdings of the other common directors are comparatively small, still, all but one lost. The annual profit to the single director who was benefited by the compromise was \$440. In the light of this showing it seems to us idle to argue that the action of the common directors or of the majority of stockholders was fraudulent or intended to subserve any interest except that which they held as stockholders in the Harlem Company. The Harlem Company gave up what, from our point of view, was a very good claim for somewhat less than half its amount. The action of the directors and of the majority of the stockholders may have been foolish and timorous, but in the light of the facts narrated, certainly, dishonest it was not. If in settling this dispute their action was dictated by excessive

timidity or caution, still they were acting within their rights on a matter the ultimate determination of which rested in their discretion, and so long as exercised honestly, in good faith, with their determination so made, whether wisely or foolishly, the courts cannot interfere.

Two claims of the appellants remain to be noticed. It is urged that the settlement of the Harlem stockholders' suit by the Central Company, already mentioned, establishes fraud. We think not; though that settlement and the execution of the indemnity bond exacted by the Harlem directors does show that the parties were very fearful of litigation. It was, doubtless, to such timidity that the settlement of the Harlem stockholder, Mr. Hitchcock, was due. It is entirely possible that had the plaintiffs been equally prompt and instituted a suit before the compromise was adopted and executed they might also have secured a settlement of their claim. *Second.* It is urged that the compromise agreement was in effect a new lease modifying the provision for rent reserved in the old lease, and that not sufficient in amount of the Central stockholders voted for its adoption to render the agreement valid in law as a lease. We concede that a modification of a lease must be executed with the same formalities and with the same vote as required by statute in the case of an original lease. But we think that the vote of the Central Company's stockholders was sufficient. Under chapter 433 of the Laws of 1893, the only requirement is that two-thirds of the stock voted upon at the meeting shall be cast in favor of the lease.

The judgment appealed from should be affirmed, with costs.

O'BRIEN, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ. concur; HAIGHT, J., not voting.

Judgment affirmed.

ELIZABETH KNOTH, Appellant, v. MANHATTAN RAILWAY
COMPANY, Respondent.

1. INJUNCTION—DENIAL UPON GROUND OF GREAT PUBLIC OR PRIVATE MISCHIEF—TIME OF APPLICATION AFFECTS CHARACTER OF RELIEF. A court of equity is not bound to issue an injunction where it will produce a great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right; the time of the application therefor will also be considered, and affects largely the character of the relief which will be granted.

2. ELEVATED RAILROAD—DENIAL OF MANDATORY INJUNCTION COMPELLING REMOVAL OF TRACK. In an action commenced in 1902 by an abutting owner against an elevated railway company for a mandatory injunction compelling it to remove a track erected without legislative authority or municipal consent over and above the center of Ninth avenue in the city of New York, between two other tracks previously erected and operated by the defendant and its predecessors, in which the plaintiff asserted his absolute right to the removal of the track, it appeared that the defendant, in good faith and relying upon certain acts of the legislature thereafter held invalid, had in 1894 constructed the track; that the plaintiff had knowledge that it was being constructed, and ever since has been familiar with its use and effect; that the third track is a great public utility and benefit; that the injury suffered by the plaintiff, if any, is small compared with the injury and inconvenience to the defendant and public if the defendant is compelled to remove the same; that its removal would seriously impair the train service and increase the danger of operation; that the payment to the plaintiff of just compensation would be a remedy as adequate as would be the removal of the track. *Held*, that the trial court, in the exercise of its discretion, properly denied a mandatory injunction; that the award of a money judgment conditioned upon the conveyance by plaintiff to the defendant of the easements appropriated for the use of the track was proper; that although the defendant is in no situation to institute condemnation proceedings to acquire property rights, it may be regarded as a corporation acting in good faith and serving the public for a long series of years without interference, and hence is justified in acquiring easements by entering into contracts with abutting owners; that plaintiff having resorted to a court of equity must abide by the result or bring an action for damages in a court of law.

Knoth v. Manhattan Ry. Co., 109 App. Div. 802, affirmed.

(Argued December 20, 1906; decided January 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Jan-

uary 4, 1906, which affirmed a judgment of Special Term granting an injunction against the maintenance and operation of the center track of defendant's railway or in the alternative that the defendant should pay a certain sum for a conveyance of the easements appropriated.

The trial court made thirty-five findings of fact; those material on this appeal are as follows: II. The defendant erected in the year 1894, without legislative authority and without municipal consent, and has since maintained and operated without such authority or consent, a center or third elevated railway track over and above Ninth avenue in the city of New York in front of plaintiff's premises and between two other elevated railway tracks previously erected, operated and maintained by the defendant and its predecessor, The New York Elevated Railroad Company. VIII. The plaintiff in 1889 purchased the property described in the complaint and known as 461 Ninth avenue, between 35th and 36th streets, and is and has been since that date the owner thereof in fee and in possession of said premises. IX. The said center or third track has been operated by the said defendant since the year 1894 by the running of express trains carrying passengers thereon, and the said track and the structure supporting it are permanent and the defendant intends indefinitely to continue the operation of trains thereon. XI. The express trains regularly operated on said track stop at no station within a mile of the plaintiff's premises. XII. The said center or third track, the additional structure supporting it and the trains operated thereon confer no benefit upon the plaintiff or upon her premises. XV. The erection and operation of the center or third track have involved a further taking of the plaintiff's easements. XX. The construction, operation and maintenance of said center or third track in front of the plaintiff's premises causes a substantial depreciation in the fee value thereof, to the extent of \$1,200. XXII. Among the rights, privileges and franchises granted to The New York Elevated Railroad Company, was the right to make and adopt such alterations and improvements in the structure, rolling

stock, motor power and its application, and in the position, grade, elevation and depression of the tracks, and the mode of securing and strengthening its railroads, sideways, crossings, stations and turnouts as might be authorized and approved by commissioners appointed pursuant to chapter 489 of the Laws of 1867, and the acts amendatory thereof and supplemental thereto. XXIII. On November 10, 1877, the commissioners of The New York Elevated Railroad Company duly approved a plan of proposed additional track of The New York Elevated Railroad Company, which plan provided for four tracks in front of plaintiff's premises, one of which tracks was a switch, crossover or connecting track, and three of said tracks were actually constructed and used prior to the year 1880. XXV. In or about the month of July, 1894, a switch, siding or third track was constructed over the portion of Ninth avenue in front of the premises in suit in addition to the structure as it existed prior thereto, the construction of which switch, siding or track had been, in the month of December, 1893, duly authorized by said commissioners in so far as they had power so to do and was constructed under color of such authority. XXVII. Since the decision by the Hon. GEORGE L. INGRAHAM of the Supreme Court in the case of *Mayor, etc., of City of New York v. The Manhattan Railway Company*, hereinbefore referred to, the defendant has spent over \$800,000 in acquiring the easements of abutting owners along the line of said third track, turnout or siding, and has procured the consent of the owners of property representing 26,927 lineal feet along Ninth and Columbus avenues out of a total of 39,514 feet. XXVIII. Said switch, siding or turnout is of great public utility, and constitutes a great public benefit. XXIX. The injury, if any, suffered by the plaintiff from the maintenance and operation of said switch, turnout, siding or third track, is small compared with the injury and inconvenience which would result to the defendant and to the public if the defendant should be compelled to discontinue the use and remove the same. XXXI. If the switch, siding, turnout or so-called "third track" in front of plaintiff's premises

should be removed, the defendant's train service would thereby be seriously impaired. XXXIII. If the switch, siding, turnout, or so-called "third track" in front of plaintiff's premises should be removed, the danger incident to the operation of trains on defendant's railway would thereby be increased. XXXIV. For any and all damages suffered by the plaintiff by reason of the construction, maintenance and operation of the so-called switch, siding or third track in front of the premises described in the complaint, the plaintiff can be adequately compensated by the payment of such sum of money as shall be found by the court to be the amount of the damages so suffered. XXXV. The payment to the plaintiff of just compensation would be a remedy for her injuries as adequate as would be the removal of the switch, siding, turnout, or so-called "third track" in front of her premises.

The conclusions of law based upon these findings of fact are the usual ones in the ordinary elevated railroad case.

J. Aspinwall Hodge for appellant. While a temporary injunction involves discretion, the granting or refusal of a permanent injunction does not, where the facts conclusively show the equities. (*McClure v. Leaycraft*, 183 N. Y. 36; *Kitching v. Brown*, 180 N. Y. 414; *Wakeman v. Wilbur*, 147 N. Y. 657; *Story v. El. R. R. Co.*, 90 N. Y. 122; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Paige v. S. R. R. Co.*, 178 N. Y. 102; *Campbell v. Seaman*, 63 N. Y. 582; *Galway v. El. R. R. Co.*, 128 N. Y. 132.). A railroad corporation having no legislative authority to build an elevated railroad structure in a city street will be enjoined from maintaining or operating it, at the suit of an abutting owner. (*Arnold v. H. R. R. R. Co.*, 55 N. Y. 661; *Galway v. E. R. R. Co.*, 128 N. Y. 134; *Aynsley v. Glover*, L. R. [18 Eq.] 544; *Irvine v. A. A. R. R. Co.*, 10 App. Div. 560.) The plaintiff has been guilty of no laches, certainly no laches which deprive her of the right to an injunction absolute. (*Pine v. City of New York*, 185 U. S. 93; *Galway v. El. R. R. Co.*, 128 N. Y. 132; *Brush v. El. R. R. Co.*, 26 Abb,

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[N. C.] 73; *Story v. El. R. R. Co.*, 90 N. Y. 122; *Powers v. El. R. R. Co.*, 120 N. Y. 178; *S. S. Co. v. R. R. Co.*, 67 Hun, 153; *P. R. R. Co. v. M. P. R. R. Co.*, 111 U. S. 506; *I. G. T. R. R. Co. v. Wade*, 140 U. S. 165.) Public convenience cannot override the plaintiff's rights and is not a matter for consideration on this appeal, but if it is to be considered the facts show that the granting of an injunction would subserve and not subvert public interest. (*Davis v. Mayor, etc.*, 14 N. Y. 506.) The judgment below cannot be supported by the contention that the plaintiff's damages are slight, and the damage to the defendants resulting from an injunction would be great. (*Ackerman v. True*, 175 N. Y. 353; *Wakeman v. Wilbur*, 147 N. Y. 657.)

Julien T. Davies, J. Osgood Nichols and *Charles A. Gardiner* for respondent. The equitable relief granted to the plaintiff was in accordance with well-recognized principles of equity and an award of mandatory relief would have been inequitable and wholly without warrant in law or in fact. (*New York City v. Pine*, 185 U. S. 93; *Penrhyn Slate Co. v. G. El. Co.*, 181 N. Y. 80; *Auchincloss v. M. Ry. Co.*, 69 App. Div. 74; *A. B. N. Co. v. El. R. R. Co.*, 129 N. Y. 252.) The court below had jurisdiction to grant alternative relief. (*Smith v. Clay*, 3 Birr. 639; *P. S. Co. v. G. El. Co.*, 181 N. Y. 80; *Atty.-Gen. v. Delaware Co.*, 27 N. J. Eq. 1; *Atty.-Gen. v. N. Y. & L. B. R. R. Co.*, 24 N. J. Eq. 49; *Amerman v. Deane*, 132 N. Y. 355; *McSorley v. Gomprecht*, 30 Abb. [N. C.] 412; *Crocker v. M. L. Ins. Co.*, 61 App. Div. 226; *Riederman v. M. M. El. L. Co.*, 56 App. Div. 23; *Bates v. Holbrook*, 171 N. Y. 460; *Kessler v. Ensley*, 141 Fed. Rep. 169.)

EDWARD T. BARTLETT, J. The Special Term awarded to the plaintiff, an owner of property abutting upon the Ninth Avenue line of defendant's elevated railway, in the city of New York, a money judgment and an injunction against the maintenance or in any way using the center or third track

upon the elevated railroad structure in front of the plaintiff's premises, described in the complaint, and known as No. 461 Ninth avenue, between 35th and 36th streets, except to remove the same, and from operating trains of cars thereon, on and after sixty days from entry of judgment and due service of a copy of the judgment and notice of entry thereof, with the usual alternative provision that if within the time limited the defendant should pay to plaintiff the sum of \$1,200, for the conveyance of the easements appropriated for the use of the center or third track, then the said injunction should not operate. This appeal is taken by the plaintiff from that part of the judgment which provides for the avoidance of the injunction by the payment of the damages awarded. The record consists of the judgment-roll, no evidence being printed in the case.

The Appellate Division having determined by unanimous decision that there is evidence supporting, or tending to sustain, the findings of fact, they are conclusive here.

The manner in which this case is now presented is unusual. The legality of the defendant's construction and operation of the center or third track is not before us. It is conceded and found that the defendant's erection of that track in 1894 was without legislative authority or municipal consent. As was well observed by the learned judge writing the opinion of the Appellate Division, that if certain findings were considered alone, it would follow that a mandatory injunction should issue compelling the defendant to remove the center or third track from in front of the plaintiff's premises. There are, however, additional findings which influenced the Supreme Court, sitting in equity, to exercise its discretionary power and refuse the issuance of a mandatory injunction.

The plaintiff's position briefly stated is, that there are no findings which justify the conclusion reached by the Appellate Division, and that it is the absolute right of the plaintiff to compel the defendant to remove the center or third track. It thus appears that the important question for our consideration is whether the Appellate Division properly exercised its discretion in view of the facts as found.

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It appears from the findings that the defendant, in good faith and relying upon the authority of certain acts of the legislature, constructed the third track. These findings are the twenty-second, twenty-third, twenty-fifth and twenty-sixth, quoted at the head of this opinion.

The twenty-second finding refers to certain rights, privileges and franchises granted to the defendant's predecessor company, under chapter 489 of the Laws of 1867, and acts amendatory thereof. The act of 1867 was amended by chapter 595 of the Laws of 1875. By section four of that act certain rights and franchises were conferred upon the New York Elevated Railroad Company, defendant's predecessor, and among others the following: "And the location of the lines or routes not specifically located by law, and the position and construction of the tracks, sidetracks, turnouts, stations and other structures which said company is or may be authorized by law to construct, may be such as said company may adopt and the said commissioners approve."

The twenty-third finding is to the effect that in November, 1867, the commissioners of the New York Elevated Railroad Company approved a plan of additional track, which provided for four tracks in front of plaintiff's premises, one of which was a switch, crossover or connecting track, and three of said tracks were actually constructed and used prior to the year 1880.

The twenty-fifth finding states, in substance, that in July, 1894, a third track was constructed in front of plaintiff's premises in addition to the structure as it existed prior thereto, the construction of which had been, in the month of December, 1893, duly authorized by said commissioners in so far as they had power so to do, and was constructed under color of such authority.

The twenty-sixth finding, in substance, is that the plaintiff had knowledge that this switch, siding or third track was being constructed and has ever since been familiar with its use and effect.

We are of opinion that the trial court and the Appellate

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Division were justified in reaching the conclusion, in view of the findings just referred to, that this is not a case of wanton trespass or the arbitrary creation of a nuisance in a public highway; but that it sufficiently appears, as a matter of fact, that the defendant acted in good faith. It is true that the Appellate Division of the first department, in *Auchincloss v. Metropolitan El. Railway Company* (69 App. Div. 63) decided at February term, 1902, held that the commissioners, under the early acts already referred to, were not vested with the constitutional power to authorize a third track along Ninth avenue. The good faith of the defendant, however, does not depend upon what the ultimate decision of the court was in regard to the powers of the commissioners, but rather upon the interpretation thereof at the time the defendant acted in the premises.

There are other and weighty findings of fact to be considered that justified the conclusion reached by the Appellate Division without regard to defendant's good faith in laying the third track. Certain rights of the public have intervened during the years that have elapsed since the third track was used for the running of express trains. Findings twenty-eighth, twenty-ninth and thirty-first are, in substance, that the third track is a great public utility and constitutes a great public benefit; that the injury, if any, suffered by the plaintiff is small compared with the injury and inconvenience which would result to the defendant and to the public if the defendant is compelled to remove the same; that if the third track should be removed, the defendant's train service would thereby be seriously impaired; that by the removal of the third track the danger incident to the operation of trains on defendant's railway would thereby be increased.

These are considerations which appeal strongly to a court of equity, and their force is in no wise abated by the fact that the plaintiff delayed her action, being in doubt as to the law governing the situation. This action was begun June 21st, 1902, the *Auchincloss Case* (*supra*) having been decided in February, 1902, declaring the power of the commissioners,

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upon which the defendant had relied, was derived from an unconstitutional statute. At that time the defendant had been running trains upon its third track for about eight years.

It is a familiar rule that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. The principle has frequently been applied in the decisions of this court and the Supreme Court of the United States.

In *Trustees of Columbia College v. Thacher* (87 N. Y. 311) the plaintiff sought to enforce a covenant restricting the character of buildings in a certain locality. It appearing that after the lapse of time the neighborhood had so changed in character as to defeat the object sought to be attained by the covenant, it was held that the enforcement thereof was inequitable and oppressive upon the defendant and should not be decreed. The same principle is laid down in *McClure v. Leaycraft* (183 N. Y. 36). This general doctrine was fully examined in the cases of *New York City v. Pine* (185 U. S. 93) and in *Penrhyn Slate Company v. Granville Electric Light & Power Company* (181 N. Y. 80). In the last two cases many authorities are cited.

The trial court found (findings 34 and 35), in substance, that any damages suffered by the plaintiff in the premises can be adequately compensated by the payment of such amount as the court should find; that the payment to the plaintiff of just compensation would be a remedy for her injuries as adequate as would be the removal of the third track.

There can be no doubt that the existence of this third track for so many years upon which express trains have been run does constitute a great public benefit. The transportation of passengers back and forth upon the narrow island of Manhattan has been for years a problem growing more and more difficult of solution, and for a court of equity to compel the removal of, or the dangerous interference with, the third track, subjecting the public not only to inconvenience but danger, would not be a wise exercise of its discretionary

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power. A court of equity is not bound to issue an injunction when it will produce a great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right. (*Gray v. Manhattan Railway Co.*, 128 N. Y. 499.)

We do not mean to intimate that the premises in question have not been damaged in the easements of light, air and access by the construction of this third track; but, in view of public interests and the long delay in instituting this action, plaintiff is properly compelled to abide by the judgment of the court of equity to which she has resorted, or bring her action for damages in a court of law.

There is one other consideration urged by the defendant against the issuing of a mandatory injunction which is found in finding twenty-seventh. It is undoubtedly the fact that the defendant having constructed its third track in front of the plaintiff's premises without legislative authority or municipal consent, is in no condition to institute condemnation proceedings to acquire property rights; but, nevertheless, it may be regarded as a corporation acting in good faith and serving the public for a long series of years without interference. It, therefore, follows that the defendant was justified in acquiring easements in aid of the construction of its third track by entering into contracts with abutting owners.

In the twenty-seventh finding it appears that the defendant has expended since the year 1894 over \$800,000 in acquiring the easements of abutting owners along the line of the third track, and has secured the consent of the owners of property representing 26,927 lineal feet along Ninth and Columbus avenues out of a total of 39,514 feet. These facts were urged upon the court below and doubtless had some influence in the decision reached.

We have not deemed it necessary to examine the many questions and cases discussed in the voluminous briefs of counsel, as we have reached the conclusion that the learned Appellate Division wisely exercised its discretion in the premises.

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Statement of case.

The judgment appealed from should be affirmed, with costs. The parties hereto are hereby allowed thirty days from the time a copy of this judgment is duly served upon the plaintiff, or her attorney, in which to carry out the provisions of the judgments of the trial court and the Appellate Division.

CULLEN, Ch. J., GRAY, O'BRIEN, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of FREDERICK COOK, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant and Respondent; FREDERICK C. MACDONELL et al., Respondents and Appellants.

1. TRANSFER TAX — RATE NOT AFFECTED BY ASSIGNMENT OF LEGACY. A succession tax is measured by the legal relation which the legatee bears to the testator, and is not affected by the relation which an assignee of the legatee bears to him.

2. SAME. Legacies to nephews and nieces, assigned by them to testator's widow for a valuable consideration and in settlement of a contest of the will instituted by her, pass, not under the will, but by virtue of the assignment; the widow takes them as assignee, not as legatee; they are taxable, therefore, under the Transfer Tax Act (L. 1896, ch. 908, §§ 220-242) at the rate of five per cent, as in the case of a bequest to nephews and nieces; not at the rate of one per cent, as in the case of a bequest to a widow.

3. LEGACY TO CHILD OF ADOPTED DAUGHTER. A legacy to the son of an adopted daughter is taxable at the same rate as if his mother had been the natural child of the testator, *i. e.*, one per cent; since the Domestic Relations Law, relating to the effect of the adoption of children (L. 1896, ch. 272, § 64), gives to an adopted child the same legal relation to the foster parent as a child of his body, and that relation extends to the heirs and next of kin of the child by adoption the same as to those of a child by nature.

4. CONSTRUCTION OF PHRASE "LINEAL DESCENDANT" — TAX LAW (L. 1896, CH. 908), § 221. The fact that the statute dealing with exemptions from the succession tax (Tax Law [L. 1896, ch. 908], § 221), while it exempts adopted children to the same extent as natural children, does not mention their heirs and next of kin, and, in describing the exempt

class, makes use of the phrase "or any lineal descendant of such decedent," does not deprive the heirs and next of kin of adopted children of the benefit of the exemption, since the words "lineal descendant" must be read in connection with the statute governing the effect of adoption, which makes the child by adoption and his heirs the same in every respect, affecting inheritance or succession, as an actual child and his heirs. In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature. The legislature created the relation and extended to it the right of inheritance, not only as between the foster parent and the adopted child, but also as between the children of the adopted child and the foster parent.

Matter of Cook, 114 App. Div. 718, reversed.

(Argued January 7, 1907; decided January 23, 1907.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 12, 1906, which modified and affirmed as modified an order of the Monroe County Surrogate's Court assessing a transfer tax on the estate of Frederick Cook, deceased.

This proceeding was instituted to ascertain and determine the amount of a succession tax under the following facts: Frederick Cook, late of the city of Rochester, died on the 17th of February, 1905, leaving a widow, but no child of his body and no descendant of any deceased child. He left, however, Fredericka Louise MacDonell, a daughter duly adopted according to the laws of this state, and Frederick Cook MacDonell, her only child. He disposed of his large estate by a last will and testament, of which only two paragraphs are now material.

By the eleventh paragraph he gave \$50,000 to his executors in trust for his "grandson, Frederick Cook MacDonell," with directions to accumulate the income until he should become fifteen years of age, and thereafter to pay him the annual income from the aggregate until he should become of full age, and then to pay him the amount of the accumulations, together with the annual income from the balance until he should reach twenty-five, when one-half of the principal

was to be paid over and the remainder when he should become thirty. In case of his death before all of the fund was paid over, the remainder was to go to his wife and children, if he left any, and if he left none it was to be paid over to the residuary legatees named in the thirty-eighth clause.

By the thirty-eighth paragraph the residue of his estate was given to various nephews and nieces.

When the will was offered for probate, the widow and adopted daughter filed objections which raised an issue as to testamentary capacity. Pending the trial a compromise was arrived at, which was carried into effect by certain instruments executed by the widow and by each of the residuary legatees, whereby for a good and sufficient consideration they duly and formally assigned, transferred and set over to her all their "right, title and interest in and to any part of the residuary estate of said Frederick Cook and all rights accruing to" them and each of them "by virtue of the provisions of said paragraph number thirty-eight of said last will." Thereupon the objections to probate were withdrawn and the will was proved. The compromise agreements have been duly kept and performed by all the parties thereto. If the litigation had proceeded and the contestants had prevailed, the entire estate of the testator would have gone to the widow and adopted daughter. The settlement was made in good faith for the sole purpose of avoiding a contest, and not to reduce the transfer tax.

After finding these facts, in substance, the appraiser found as conclusions of law that the bequest to Frederick Cook MacDonell should be taxed at five per cent, which amounted to \$2,500, and that the entire residuary estate should be taxed at the same rate, which amounted to \$25,223.38. Upon appeal to the surrogate this determination was affirmed, but upon appeal to the Appellate Division it was reversed by a divided vote as to the tax on the residuary estate, which was fixed at the rate of one per cent, amounting to \$8,924.67, and affirmed as to the tax on the legacy to Frederick Cook

MacDonell. The state comptroller appealed from the modification of the surrogate's decree, and the executors and Frederick Cook MacDonell from the entire order.

Merton E. Lewis and *William T. Plumb* for state comptroller, appellant and respondent. The entire residuary estate created by Mr. Cook's will is taxable at the rate of five per cent. (*Matter of Wolfe*, 89 App. Div. 349; *Matter of Edson*, 38 App. Div. 19; *Amherst College v. Ritch*, 151 N. Y. 282; *Greenwood v. Holbrook*, 111 N. Y. 465.) The legacy to Frederick Cook MacDonell was property taxed at five per cent. (*Matter of Moore*, 90 Hun, 162; *Matter of Deutsch*, 107 App. Div. 192; *Tompkins v. Verplanck*, 10 App. Div. 572; *Hanlin v. Osgood*, 1 Redf. 409; *N. Y. L. Ins. & Trust Co. v. Viele*, 161 N. Y. 11; *Matter of Hopkins*, 43 Misc. Rep. 464; *Matter of Cramer*, 170 N. Y. 271; *Johnson v. Brasington*, 156 N. Y. 181; *Mitchell v. Thorne*, 134 N. Y. 536; *Comm. v. Nancrede*, 32 Penn. St. 389.)

Charles Van Voorhis for Barbara Cook et al., respondents and appellants. It was error to tax the transfer to Frederick Cook MacDonell at five per cent. (*Gillam v. G. T. Co.*, 186 N. Y. 127; *Simmons v. Burrell*, 8 Misc. Rep. 388; *Von Beck v. Thomsen*, 44 App. Div. 373; 167 N. Y. 601; *Dodin v. Dodin*, 16 App. Div. 42; 162 N. Y. 635; *Kemp v. N. Y. P. Exchange*, 34 App. Div. 178; *Power v. Hapley*, 4 S. W. Rep. 683; *Vidal v. Commagere*, 13 La. Ann. 516; *Humphreys v. Davis*, 100 Ind. 274; *Matter of Miller*, 45 Hun, 244; *Matter of Butler*, 58 Hun, 400.) The residuum of the estate, with the exception of \$97,000, was properly taxed at one per cent. (*Matter of Wolfe*, 89 App. Div. 349; *Greenwood v. Holbrook*, 111 N. Y. 465.)

VANN, J. By the appeal of the comptroller the question is presented whether the transfer tax upon the residuary estate should be at the rate of one per cent, as fixed by the Appellate Division, or five per cent, as fixed by the surrogate.

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The tax was reduced. upon the theory that the compromise was a renunciation by the residuary legatees of their interest in the residuary estate, and this conclusion was reached in reliance upon the recent case of *Matter of Wolfe* (89 App. Div. 349; 179 N. Y. 599).

In that case the testator had bequeathed to the persons nominated as executors the sum of \$20,000 for their own use. After his death those legatees, called for convenience the executors, by an appropriate instrument duly renounced and released said bequest, so that the amount given to them fell into the residuary trust for the benefit of the testator's children and their descendants. The executors, instead of accepting the legacy given to them, absolutely refused to accept it by a formal instrument of renunciation. It was held that the legacy was not subject to a tax calculated at the rate at which it would have been taxable if it had been actually accepted by the original legatees, but at the rate at which it would have been taxable if the will had originally provided that it should pass to the residuary legatees. This conclusion was reached upon the ground that the Transfer Tax Act does not provide that an attempted transfer by a bequest which is refused by the beneficiary, should be taxed the same as if it were accepted; that the tax was on the succession and not upon the property; that an intended beneficiary has the right to refuse a gift, "and if a testamentary bequest is refused, the voluntary relinquishment of the donation by the legatee leaves nothing to be taxed unless it be the ultimate transfer of property under the will as necessitated by the relinquishment." No opinion was written by this court in that case, but the learned justice who wrote for the Appellate Division very appropriately said: "If no transfer is effected because it turns out that there is no property to transfer, no tax can be collected, and if the legatee renounce the gift and refuse to receive it, no tax can be collected with respect to him, because there has been no transfer to him. His right to renounce the privilege of accepting the donation is not denied or forbidden by the statute, and such right is

recognized by the authorities. * * * On his effective renunciation the title to or ownership of the property of the gift remains in the estate to be disposed of under the terms of the will and the succession is taxable in accordance with the nature of the ultimate devolution. * * * Assuming the right of an individual to reject proffered bounty, whether tendered by deed to take effect at the grantor's death, or by will, I can see no good reason for applying the provisions of the tax law to a mere abortive attempt at a transfer as well as to the consummated act."

We adhere to that decision, but are unable to see that it applies to the case before us. In that case there was no transfer by will to the executors, because in accordance with their undoubted right they refused to accept the legacy. No person can be compelled to accept a gift from a living person or by the will of a decedent unless, possibly, by his creditors if he is insolvent. Neither the gift nor the bequest is effective as a transfer until it is accepted, for acceptance is as essential as the offer. In the *Wolfe* case, therefore, there was no transfer by will to the executors, but the amount that would have gone to them if they had not renounced it passed under another clause of the will the same as if the executors had died before the testator. It was properly held, therefore, that no tax could be imposed upon the attempted transfer to the executors because the attempt was not successful, but that it should be imposed upon the only effective transfer which was through the residuary clause.

The facts in the present case are utterly different in their nature and in the legal effect thereof. Here the transfer of the residuary estate was to the residuary legatees named in the will. They neither renounced nor refused to accept. On the contrary, they accepted the bequest, not in express terms, but by necessary implication, for they transferred the same to the widow who accordingly took the residuary estate not through transfer by the will, but through transfer by the assignment. While they could renounce they could not assign without accepting. The testator gave the residuum to his

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nephews and nieces and they sold it to the widow, who paid a large sum of money therefor. Upon the final settlement of the estate the decree will naturally adjudge that the residuary legatees took the residuum, but that the widow is entitled to it because they transferred it to her. They did not renounce or release to the estate but transferred to her, the same as they might have transferred to a stranger. She took solely by transfer from them and not by any transfer to her by virtue of the will. Her husband did not bequeath his residuary estate to her, but to them. That estate vested in some one at the exact moment when he died, subject to the right of refusal by the legatee, and it did not then vest in her, for her name is not mentioned in the residuary clause. Her first and only connection with the residuum is through the several assignments executed to her for a consideration, the sufficiency of which is not disputed, whereby each residuary legatee did thereby "assign, transfer and set over unto Barbara Cook, widow of the said Frederick Cook, deceased, all my right, title and interest in and to any part of the residuary estate of said Frederick Cook and all rights accruing to me by virtue of the provisions of said paragraph number thirty-eight of said last will."

The compromise did not change the will. No settlement could change a word that the testator wrote. The will stands as it was written, and the most solemn instrument, executed by all parties interested, could not convert a bequest to the nephews and nieces into a bequest to the widow. As we said in another case, she takes under them "by contract, not under the will or from the testator." (*Greenwood v. Holbrook*, 111 N. Y. 465, 471.) A succession tax is measured by the legal relation which the legatee bears to the testator and is not affected by the relation which an assignee of the legatee bears to him. Here the legatees took the residuum under the will. They succeeded the testator in the ownership thereof and their succession gives rise to the tax. The widow did not take the residue from the testator, for he did not give it to her. She took as assignee, not as legatee. Unless she took as assignee,

she did not take at all. The legatees assigned to her and the rate of taxation is fixed by their relation to the testator. As she did not take through the will, the succession tax cannot be fixed at the rate of one per cent, as in the case of a bequest to a widow, but must be fixed at the rate of five per cent, as in the case of a bequest to nephews and nieces.

The appeal by the executors and Frederick Cook MacDonell presents the question whether succession through the bequest of a foster parent by the descendant of an adopted child is to be taxed at the rate of one per cent or five.

As we have said, the measure of a succession tax under a will is the legal relation borne by the legatee to the testator. The legal relation is the one established by law, and, while it usually follows the natural relation, it does not in all cases. Thus the relation of an adopted child to the foster parent is created by statute and nature has nothing to do with it. The legislature has supreme control of the subject and may give heritable blood when nature did not. The question is, therefore, what relation is created by statute between the descendant of an adopted child and the foster parents with reference to the subject of succession to property? We find the answer in the Domestic Relations Law, which, in section 64, entitled "effect of adoption," provides as follows: "The foster parent or parents and the minor sustain toward each other the legal relation of parent and child and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, * * * and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting * * *." The exceptions and limitations which appear in the statute are not now material.

Thus the statute gives to an adopted child the same legal relation to the foster parent as a child of his body, and that relation extends to the heirs and next of kin of the child by adoption the same as to those of a child by nature. The artificial relation is given the same effect as the actual relation,

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so far as the right of succession is concerned, and the statutory grandchild and grandparent inherit from each other the same as if the relation had been created by nature. In other words, the legislature has ordained that there shall be no difference in the right to inherit between a child by adoption and his heirs and next of kin and a child by nature and his heirs and next of kin, and the courts, as in duty bound, have obeyed the command. (*Dodin v. Dodin*, 16 App. Div. 42; 162 N. Y. 635; *Von Beck v. Thomsen*, 44 App. Div. 373; 167 N. Y. 601; *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127.)

The Tax Law, in dealing with the subject under the head of exemptions, is less specific, for, while it exempts adopted children to the same extent as natural children, it does not mention their heirs and next of kin, and in describing the exempt class it makes use of the phrase "or any lineal descendant of such decedent." (§ 221.) The Appellate Division, in rendering judgment, seem to have been controlled by the words "lineal descendant," but they must be read in connection with the statute governing the effect of adoption. That effect, as we have seen, is to make the child by adoption and his heirs the same in every respect, affecting inheritance or succession, as an actual child and his heirs. The natural relation and the statutory relation are made one and the same as to the devolution of property. If the legislature could do this, it has done it and it is not denied that it could do it.

A lineal descendant is one who is in the line of descent from a certain person, but, since the Domestic Relations Law went into effect, not necessarily in the line of generation. The line of descent is the course that property takes according to law when the owner dies. By force of the statute that course is the same in the case of adopted children that it is in the case of own children. In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature. The legislature created the relation and

extended it to the right of inheritance, not only as between the foster parent and the adopted child, but also as between the children of the adopted child and the foster parent.

We think that the right of succession by Frederick Cook MacDonell was subject to taxation at the same rate as if his mother had sprung from the loins of the testator.

The order of the Appellate Division should be reversed and the decree of the surrogate modified by reducing the succession tax upon the legacy to Frederick Cook MacDonell from the sum of \$2,500 to the sum \$500, and as thus modified, said decree is affirmed, without costs in any court to any party.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Ordered accordingly.

JULIA S. BOYD, Respondent, v. UNITED STATES MORTGAGE AND TRUST COMPANY, Appellant, Impleaded with Others.

1. AMENDMENT — CHANGING DESIGNATION OF DEFENDANT FROM REPRESENTATIVE TO INDIVIDUAL CAPACITY DOES NOT EFFECT A CHANGE OF PARTIES — STATUTE OF LIMITATIONS. The Supreme Court has power, under section 723 of the Code of Civil Procedure, to permit the amendment of the summons and complaint in an action of negligence by changing the designation of the defendant from trustee to that of an individual. The effect of the amendment is not tantamount to bringing in a new party, so as to enable it to plead the Statute of Limitations as a bar to its liability, more than three years having elapsed between the time of the accident and the date of the service of the amended summons and complaint, but merely changes the capacity in which the defendant is sought to be charged.

2. NEGLIGENCE — INJURIES RECEIVED BY PLAINTIFF WHILE EXAMINING UNFINISHED BUILDING AT INVITATION OF DEFENDANTS. The facts examined, in an action brought to recover for injuries received by the plaintiff, by falling through an open and unguarded stairway in a dark place, while examining an unfinished building, for the purpose of renting apartments therein, at the invitation of defendants and accompanied by their agent, and held, sufficient to sustain a verdict for plaintiff.

Boyd v. U. S. Mortgage & Trust Co., 110 App. Div. 866, affirmed.

(Argued November 21, 1906; decided January 22, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 21, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore H. Lord and *Alfred A. Wheat* for appellant. A verdict should have been directed against the plaintiff on the ground that the cause of action alleged did not accrue within three years next preceding the service of the summons and complaint. (*Schriner v. Schriner*, 86 N. Y. 580; *Davidson v. Hoen*, 47 Hun, 51; *Matter of Warner*, 39 App. Div. 91; *Abbott v. Ry. Co.*, 120 N. Y. 652; *Shaw v. Cook*, 78 N. Y. 194; *Keating v. Stevenson*, 24 App. Div. 625; *United Press v. Abell Co.*, 73 App. Div. 240; *U. P. Ry. Co. v. Wilder*, 158 U. S. 285; *Norling v. Allee*, 13 N. Y. Supp. 791; 131 N. Y. 622; *O'Brien v. Jackson*, 167 N. Y. 31; *Parker v. Day*, 155 N. Y. 383.) Plaintiff was guilty of contributory negligence. (*Whalen v. Gas Light Co.*, 151 N. Y. 72; *Brugher v. Buchtenkirch*, 167 N. Y. 153; *Piper v. N. Y. C. R. R. Co.*, 156 N. Y. 224; *Halpin v. Townsend*, 107 N. Y. 683.) No relation was established between the defendants Greene & Taylor and the defendant trust company upon which the trust company could be charged with liability for the negligence of Greene & Taylor or one of their employees. (*Johnson v. N. A. S. N. Co.*, 132 N. Y. 576; *Lewis v. L. I. R. R. Co.*, 162 N. Y. 52; *Uppington v. City of New York*, 165 N. Y. 222.)

Howard Taylor and *Charles B. Brophy* for respondent. The defense of the Statute of Limitations cannot prevail unless the order of amendment be reversed. (Code Civ. Pro. § 380; *U. P. R. Co. v. Wilder*, 158 U. S. 285.) The amendment of the caption was properly allowed. (*Town of Oyster Bay v. Jacob*, 109 App. Div. 612; *Soldiers' Home v. Sage*,

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11 Misc. Rep. 159; *Albany Brewing Co. v. Barckley*, 42 App. Div. 335; *Thileman v. Mayor, etc.*, 71 App. Div. 595; *Deyo v. Morse*, 144 N. Y. 216; *United Press v. Abell Co.*, 73 App. Div. 240; *Kerrigan v. Peters*, 108 App. Div. 292; *Foster v. C. Nat. Bank*, 183 N. Y. 379; *House v. Carr*, 185 N. Y. 453; *Rowell v. Moehler*, 91 Hun, 421.) The questions relating to the defendant's negligence and the plaintiff's contributory negligence were properly left to the jury, whose verdict was fully supported by the evidence. (*Withers v. B. R. E. Exchange*, 106 App. Div. 255; *Fleis v. Endicott*, 15 Wkly. Dig. 7; *Eastland v. Clarke*, 165 N. Y. 420; *Kenney v. Rhinelander*, 28 App. Div. 246; *Bower v. Cushman*, 55 App. Div. 45; *Barrett v. L. O. B. Imp. Co.*, 174 N. Y. 310.)

WILLARD BARTLETT, J. The original summons in this action was served on July 25, 1900. In the caption Julia S. Boyd was named as plaintiff and "The United States Mortgage & Trust Co. as substituted Trustee under the Will of Matthew Byrnes, deceased, and William Z. Greene and Louis R. Taylor, doing business under the name of Greene and Taylor" were named as defendants. The original complaint which was served on the same date was entitled in the same manner. It alleged that the United States Mortgage & Trust Co. was a domestic corporation and that the defendants Greene and Taylor were partners in the real estate business; that the United States Mortgage & Trust Co. "as trustee" at the time thereafter mentioned was the owner of the Lorraine Apartment House in the city of New York; that for the purpose of inducing persons to become tenants thereof the United States Mortgage & Trust Co. as trustee had constituted as its agents the defendants Greene and Taylor, who had accepted such appointment; that on November 16, 1899, the plaintiff being desirous of engaging an apartment, and being induced by the defendants' representations, applied at the offices of the defendants Greene and Taylor for information concerning the same, and was then and there induced by the defendants Greene and Taylor to go to the

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Lorraine Apartment House and examine the apartments; that being conducted by an employee of the defendants Greene and Taylor, she went into the building, which was at the time, to the knowledge of the defendants, in an unsafe and dangerous condition, inasmuch as certain of the floors and rooms therein were unfinished; that the plaintiff was assured by the defendants Greene and Taylor that the building was safe and that she would run no risk of injury or danger in entering or passing through the same; that relying on this representation and assurance, the plaintiff allowed herself to be conducted therein by Greene and Taylor's employee, and that while thus lawfully in the building at the invitation of the defendants, and as she was being conducted through the building, the plaintiff, without fault or negligence on her part and while exercising due care, and solely owing to the negligence of the defendants, stepped into a hole or open space in the nature of a concealed trap in the floor, which could not be seen on account of the darkness of the room, and fell to the story below; by reason of which negligence plaintiff was severely injured to her damage in the sum of \$15,000.

Answers denying any negligence were interposed by "The United States Mortgage & Trust Co. as substituted Trustee under the will of Matthew Byrnes, deceased," and by the defendants Greene and Taylor. Nothing more appears to have been done in the action until May, 1903, when a motion was made at the New York Special Term in behalf of the plaintiff for leave to amend the summons and complaint by striking out in the caption the words "as substituted Trustee under the Will of Matthew Byrnes, deceased" after the words "United States Mortgage & Trust Co." The Special Term denied this motion, but its order was reversed by the Appellate Division, which granted the desired leave to amend. (*Boyd v. United States Mortgage & Trust Co.*, 84 App. Div. 466.) The order of the Appellate Division further provided that the plaintiff should serve upon the United States Mortgage & Trust Co. a copy of the amended summons and amended complaint, and that the said corporation should have

twenty days thereafter within which to answer the amended complaint. Availing itself of this permission the United States Mortgage & Trust Co. served a new answer under the changed caption on July 15, 1903, in which, in addition to its previous denial of any negligence, it pleaded as a separate defense that the cause of action alleged in the complaint did not accrue within three years next before the commencement of the action.

An order was subsequently entered dismissing the complaint as to the defendants Greene and Taylor, so that when the case came on for trial in March, 1905, the United States Mortgage & Trust Co. was the sole defendant. The plaintiff recovered a verdict of \$1,000 damages upon evidence which is amply sufficient to sustain the recovery; and the only substantial question presented by this appeal is whether the defendant was not entitled to have the complaint dismissed under its plea of the Statute of Limitations, inasmuch as more than three years had unquestionably elapsed between the time of the accident, November 15, 1899, and the date of the service of the amended summons and complaint changing the title of the action, which was July 15, 1903.

The power of the court to permit an amendment of the summons and complaint so as to show that the defendant is sued individually instead of being sued in a representative capacity is hardly open to serious question. Section 723 of the Code of Civil Procedure expressly provides that the court in furtherance of justice may amend any process or pleading by adding or striking out the name of a person as a party or by correcting a mistake in the name of a party. The amendment of the summons and complaint in this case by omitting therefrom "as trustee" after the name of the United States Mortgage & Trust Company was either "striking out the name of a person as a party" or "correcting a mistake in the name of a party;" and whichever it may have been it was an amendment clearly within the power of the court to allow. The question here is not so much as to the authority to permit the amendment as to the effect of the amendment after

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it had been permitted. Was the change effected by the omission of the words "as trustee" tantamount to bringing in a new party for all purposes, so that the United States Mortgage & Trust Company is to be regarded as not having been brought into court at all in its individual capacity until the service of the amended summons and complaint?

In 1878 the General Term of the Supreme Court in the second department determined that the Special Term possessed the power to grant leave to amend a summons and complaint by striking out the words "as administratrix" after the name of the defendant so that the action might proceed thereafter against the defendant individually. (*Tighe v. Pope*, 16 Hun, 180.) The suit was brought by an attorney to recover the value of professional services performed for the defendant as administratrix of her husband's estate. In the summons and complaint the plaintiff described the respondent as administratrix and he prayed for judgment against her as such. A motion was made before trial to amend the process and pleading by omitting the words "as administratrix" and otherwise altering the complaint so as to charge the defendant in her individual capacity, but the motion was denied at Special Term on the ground that the proposed change would introduce a new defendant and a new cause of action, which the court had no power to do. The General Term reversed the order, holding that the motion ought to have been granted. The opinion of the General Term was written by the late Mr. Justice GILBERT, one of the most accurate and discriminating lawyers who ever sat on the bench of the Supreme Court in this state; and his reasoning and the result which he reached have been mentioned with approval in every instance which I have been able to find in which the case has been cited either in our own or in other jurisdictions. Judge GILBERT declared that the proposed amendment would have been in furtherance of justice. "It would have worked no change in the cause of action except to make it one against the defendant personally instead of one against her in her representative capacity of administratrix.

* * * Whether the amendment is allowed or not the same person will be the defendant and I cannot see that any increased burden will be cast upon her by compelling her to defend personally instead of allowing her to succeed upon the technical ground that she did not incur the liability claimed in her capacity of administratrix." Precisely the same question came before the Supreme Court of Errors of Connecticut in *McDonald v. Ward* (57 Conn. 304), where it was held that a complaint against the defendant as administrator could be amended so as to make it charge the defendant in his capacity as an individual. In the opinion of that court the New York case of *Tighe v. Pope* (*supra*) is cited and strongly approved by Loomis, J., who declared that the question involved therein "was disposed of so justly that we can not do better than adopt the reasoning of that court;" and emphasis was laid upon the fact that the person of the defendant was the same before and after the amendment and that he was unquestionably liable as an administrator under the Connecticut statute or as an individual at common law. Among the New York cases in which *Tighe v. Pope* has been accepted as authority may be cited *Munzinger v. Courier Co.* (82 Hun, 575); *Dean v. Gilbert* (92 Hun, 427); *Albany Brewing Co. v. Barchley* (42 App. Div. 335), and *Alker v. Rhoads* (73 App. Div. 158). In several other states the same liberality of amendment is allowed, as, for example, Massachusetts, where a writ against a defendant personally can be amended so as to charge him in his capacity as administrator (*Lester v. Lester*, 8 Gray, 437; *Hutchinson v. Tucker*, 124 Mass. 240), and Alabama, where it has been held that if a defendant is sued in his representative character the complaint may be amended so as to make the cause of action stand against him in his individual character. (*Lucas v. Pittman*, 94 Ala. 616.)

Assuming, as I think we must assume, that the Supreme Court at Special Term possessed authority to permit the amendment of the summons and complaint which was allowed in this case, we are confronted with the much more serious

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question, in respect to which the members of the court below have differed, as to the effect of that amendment. If its effect was to bring in a new party in the fullest sense of that term—that is to say, a defendant who had never before been brought into court in this action for any purpose—then as to such defendant the action cannot be deemed to have been commenced until the service of the amended process, and such defendant would not be deprived of the benefit of its plea of the Statute of Limitations. As to *new parties* brought in by amendment a suit is begun only when they are brought in by the amendment and the service of the amended process. “If between the time of the commencement of the suit and the time when the new parties are brought in the period of limitation has expired they may plead the statute in bar of their liability although the defense may not be available to the original defendants.” (*Shaw v. Cock*, 78 N. Y. 194, 197.) So far as this branch of the case is concerned, the position of the appellant here rests upon the authority of the decision last cited. The argument is that the amendment in effect added to the action an entirely new defendant, the purpose of the amendment being not merely to correct a mistake in the name of the defendant so as to continue the action against the party originally intended, but to bring in and render liable a different defendant from the first one sought to be charged. If this view be correct, it manifestly requires a reversal of the judgment in favor of the plaintiff.

On the other hand, the respondent contends and the court below has held that an amendment which changes an action brought against a person in a representative capacity to an action against the same person as an individual does not really bring in a new party defendant. In the prevailing opinion at the Appellate Division, Mr. Justice O'BRIEN, referring to the argument that a judgment against the United States Mortgage & Trust Company as trustee would not be binding upon it individually, declares that this proposition is not determinative of the question, and says: “It is that very fact which

makes the amendment necessary, but the result of the amendment was not to bring in a new *party*. What is controlling in each case is whether or not a new party, that is, a new person or corporation, is, by the amendment, made a defendant. Here the mortgage company was served originally and nothing was gained in having it before the court by the new service, but for the proper entry of the judgment against it the designation was upon motion changed by striking out the words 'as substituted trustee,' etc. It follows that as it was not subsequently brought in, the Statute of Limitations would not constitute a bar to the maintenance of the action against it." (*Boyd v. United States Mortgage & T. Co.*, 94 App. Div. 413, 417.)

The question which has given rise to such a difference of opinion in the court below is one of considerable practical importance to the legal profession, and I have, therefore, sought light upon it by the examination of a large number of cases, both English and American, to which no reference has been made either in the briefs or arguments of counsel. As a result of this research, and after a careful consideration of the reasoning in support of the contending views, I am satisfied that the amendment allowed in the case at bar does not really bring in a new party in the sense of making one a defendant who was not in any sense a defendant before the process and pleading were amended. It merely changes the capacity in which the same person is sought to be charged. That person having actually been brought into court by the service of the original process there seems to be no reason why he should not be required to contest upon the merits any cause of action growing out of the facts alleged in the complaint which the plaintiff may have against him in one capacity rather than in another provided that he is notified by a timely and proper amendment of the precise capacity in which the plaintiff seeks to hold him liable.

Mr. Chitty, in his well-known work on Pleading, where he discusses the general requirement that a declaration shall correspond with the process, calls attention to the fact that the

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Uniformity of Process Act (2 W. 4, c. 39) is silent as to the necessity of inserting any description of the character or right in which the plaintiff sues or the defendant is sued, saying: "It is probable that it was intended by that statute merely to require that the form of action should be stated and the amount of the debt indorsed, which it was perhaps considered would sufficiently inform the defendant in all actions what was the nature of the claim and the supposed liability." (1 Chitty on Pleading [16th Am. ed.], 268.) He points out that it had been held in the Court of Common Pleas that on general process, not stating the character in which the plaintiff sued or the defendant was sued, the plaintiff might declare against a defendant as executor or administrator. This was so decided in the case of *Watson v. Pilling* (6 Moore's Reports, 66), where the defendant applied to set aside the declaration and all subsequent proceedings for irregularity on the ground that the plaintiff had sued out common process against the defendant generally, but had declared against him as administrator. Opinions were delivered by Lord Chief Justice DALLAS and Justices BURROUGH and RICHARDSON, all of whom agreed that the application should be denied and the rule discharged. The lord chief justice said it had long since been decided that in a suit begun by the service of a common *capias* the plaintiff might declare in whatever action he thought proper. "The only object of the process is to compel the party against whom it is issued to appear; and when he is in court the plaintiff in his declaration discloses the form and cause of action for which he sues." Mr. Justice BURROUGH declared it to be "quite clear that the object of the process is merely to bring the defendant into court;" and Mr. Justice RICHARDSON observed: "It has long since been established that on common process the plaintiff may declare as an executor or administrator; and it appears to me that this principle applies more strongly to the case of a defendant who is declared against in his representative capacity. Although it may be inconvenient to him to be at first unacquainted with the precise nature of the plaintiff's claim, still the court

ought not either to alter or extend the practice in this respect." While other English decisions may be found at *nisi prius* in conflict with this view, the case cited and others to the same effect suffice to show a frequent judicial recognition of the fact that when a particular person has been served with process not specifying the precise capacity in which he is sought to be charged, he has, nevertheless, been brought into court to such an extent that he may be declared against in a representative character. In other words, an action against him has been commenced, and if the plaintiff by averments in the declaration makes manifest his purpose to charge him only in a representative capacity he may be permitted to do so without being placed in the same position as that which he would occupy if required to begin the suit anew. The court in the case supposed is deemed to have acquired jurisdiction over the person of the individual served and may continue to exercise that jurisdiction over him in any capacity in which the plaintiff seeks to render him liable, provided only that he in his own person is the only one called upon to litigate the issue proffered by the declaration.

This conclusion is not in conflict with the rule that a former judgment includes a party only in the character in which he was sued. (See *Leonard v. Pierce*, 182 N. Y. 431, 432, and cases there cited.) As was said by Judge HAIGHT in that case: "If the judgment was for or against an executor, administrator, assignee or trustee it would not preclude him in an action affecting him personally from disputing the findings or judgment although the same questions are involved." So here, if the present action had gone on against the United States Mortgage & Trust Company as trustee judgment therein would not have been binding upon the corporation simply as such without reference to its representative capacity. That fact, however, is not perceived to have any bearing upon the question of the power to amend or the effect of the amendment when allowed. Nor does the decision of this court in *Shaw v. Cock* (*supra*) demand a different conclusion; for there the effect of the amendment permitted was to bring into

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the action a corporation which had never been in it before, whereas here there was no change in the particular defendant sought to be charged, but merely a change in the capacity in which he was sued.

I have said in the beginning of this opinion that the evidence was sufficient to sustain the recovery; but perhaps I ought to add a few more words on this subject, inasmuch as the case has been twice tried and the first judgment in favor of the plaintiff was reversed by the Appellate Division because of the meagerness of proof to show just how the injuries were caused. (*Boyd v. U. S. Mortgage & Trust Co.*, 94 App. Div. 413.) Upon the trial now under review, however, the defects then pointed out were supplied by the testimony of Mr. J. George Payne, the broker's agent who accompanied the plaintiff to the apartment house where she was injured, from which it appears that she fell from the side of a stairway which she was ascending at his instance, and which was unprotected by any balustrade on that side. According to her statement, she was about to go toward a doorway which was lighted with the light of day, and this young man told her not to do that, but to go ahead. "To go ahead was to go through another doorway which seemed pitch black dark. I crossed the threshold, took another step, and said, 'No, you better go ahead;' he was on my left. He passed me on my right and I felt myself going down, down, and a horrible sensation. The place into which I fell was not visible at the time." Mr. Payne testified that the plaintiff would not have fallen if there had been a balustrade there.

It seems to me that the proof now presents all the elements necessary to charge the defendant with liability. The defendant owning the building employed Greene & Taylor to procure tenants for apartments therein. This employment contemplated the inspection of such apartments under the direction of Greene & Taylor. It is true there is testimony by a former officer of the defendant corporation to the effect that Greene & Taylor were directed not to take any persons to inspect the building without informing them that they would

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do so at their own risk, but it does not appear that the plaintiff was ever so informed. She went to the apartment house at the instance of Greene & Taylor conducted by their representative whose directions as to her movements she implicitly obeyed, and while so doing she was injured in consequence of the unguarded condition of a stairway. I think a jury might well find the owner chargeable with negligence under such circumstances and the intending tenant free from contributory negligence. Such was the view of a majority of the Appellate Division on the last appeal, and with that view I concur.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Judgment affirmed.

In the Matter of the Petition of MAYNARD N. CLEMENT, as State Commissioner of Excise, Respondent, for an Order Canceling Liquor Tax Certificate No. 23,186, Issued to J. N. HEGEMAN AND COMPANY, Appellant.

LIQUOR TAX LAW — PROCEEDINGS FOR REVOCATION OF CERTIFICATE — REFERENCE TO TAKE PROOFS UNAUTHORIZED — L. 1905, CH. 680. Upon the return of a petition and order to show cause in a proceeding for the revocation of a liquor tax certificate, instituted under subdivision 2 of section 28 of the Liquor Tax Law (L. 1896, ch. 112, as amd. L. 1905, ch. 680), where the answer to the petition has been filed, the Supreme Court at Special Term has no power to refer the matter to a referee to take the proofs and report the testimony to the court for its hearing and final determination. The power to refer having been omitted from the amendatory statute of 1905, the legislature must be assumed to have intended to change the practice in this regard.

Not reported below.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1906, which affirmed an order of Special Term appointing a referee in the within proceeding.

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This is a special proceeding, brought by the state commissioner of excise, under section 28, subdivision 2, of the Liquor Tax Law, to obtain an order revoking and cancelling a liquor tax certificate issued to J. N. Hegeman & Company. The ground of the proceeding, as stated in the petition, is an alleged violation of the Liquor Tax Law by J. N. Hegeman & Company, retail druggists in the borough of Manhattan, in the sale to an agent of the excise department of twelve bottles of a proprietary medicine known as "Peruna."

The proceeding was commenced by an order to show cause granted by a justice of the Supreme Court upon the petition of the state commissioner of excise and accompanying affidavits. On the return of the order to show cause, J. N. Hegeman & Company filed an answer denying each and every violation of the Liquor Tax Law alleged in the petition, and the court appointed a referee to take proofs in relation to the allegations of the petition and answer and report the evidence to the court with all convenient speed.

J. N. Hegeman & Company appealed from this order of reference to the Appellate Division, where the same was affirmed. Appeal from said order of affirmance was taken by permission of the Appellate Division and the following question certified to this court: "Has the Supreme Court at Special Term upon the return of a petition and order to show cause in a proceeding for the revocation of a liquor tax certificate, instituted under subdivision 2 of section 28 of the Liquor Tax Law, where the answer to the petition has been filed, power to refer the matter to a referee to take the proofs and report the testimony to the court for its hearing and final determination?"

W. L. Barnum and *Edwin M. Wells* for appellant. The Supreme Court had no authority, under the Liquor Tax Law, to appoint a referee herein. (L. 1905, ch. 680; *Matter of Davis*, 168 N. Y. 110; *Matter of Prime*, 136 N. Y. 347; *Bank of Metropolis v. Faber*, 150 N. Y. 200; *Hartung v. People*, 22 N. Y. 995; *Smith v. People*, 47 N. Y. 338; *Mat-*

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ter of Lawson, 109 App. Div. 199; *Matter of Rochester Water Comrs.*, 66 N. Y. 415; *People ex rel. Furman v. Clute*, 50 N. Y. 451; *People v. Kilbourne*, 68 N. Y. 479.) A liquor tax certificate is a property right, and the statute under which the holder may be deprived of it must be strictly pursued, and authority to order a reference in such a case must appear, either in the statute or some general legislative enactment. (*Matter of Lyman*, 160 N. Y. 96; *Matter of Peck*, 167 N. Y. 391; *Adams v. W., etc., Ry. Co.*, 10 N. Y. 328; *Matter of Water Comrs.*, 96 N. Y. 357; *Camp v. Ingersoll*, 86 N. Y. 433; *Doyle v. M. E. Ry. Co.*, 1 Misc. Rep. 376.)

Herbert H. Kellogg for respondent. The court has the power to order a reference in this proceeding even in the absence of express statutory language. (*Marshall v. Meech*, 51 N. Y. 140; *Dwight v. St. John*, 25 N. Y. 203; *Matter of Cullinan v. Watson*, 93 App. Div. 540; Code Civ. Pro. § 1015; *Matter of Cullinan v. Neus*, 41 Misc. Rep. 392; *Matter of Cullinan v. Babski*, 40 Misc. Rep. 583; *Matter of Cullinan v. Capdeville*, 94 App. Div. 619; *Matter of Cullinan v. Kray*, 181 N. Y. 527.) This power is well settled in special proceedings generally. (*Riley v. Brown*, 44 How. Pr. 429; *Marshall v. Meech*, 51 N. Y. 140; *Martin v. Hodges*, 45 Hun, 38; 2 Rumsey's Pr. [2d ed.] 412; *Davies v. Davies*, 20 Abb. [N. C.] 170; *People ex rel. Del Mar v. St. L. & S. F. Ry. Co.*, 44 Hun, 552; *Matter of Bohm*, 4 Hun, 558; *Amsdell v. Martin*, 20 Wkly. Dig. 370; *Dwight v. St. John*, 25 N. Y. 205.)

EDWARD T. BARTLETT, J. The determination of this appeal depends upon the construction of section 28, subdivision 2, of the Liquor Tax Law, as amended by the Laws of 1905, chapter 680, as this proceeding was instituted after the amendment. Prior to this amendment the sentence of the section now submitted for construction read as follows: "On the day specified in such order, the justice, judge or court before whom

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the same is returnable shall grant such order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file a verified answer to said petition, which answer denies each and every violation of the Liquor Tax Law alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition or answer, or appoint a referee to take proofs in relation thereto, and report the evidence to such justice, judge or court, without opinion."

This sentence, as amended, reads as follows: "On the day specified in such order, the justice, judge or court before whom the same is returnable shall grant such order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file an answer to said petition, which answer denies each and every violation of the Liquor Tax Law alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties in relation to the allegations of the petition or answer."

The power to refer is omitted from the amended statute. The single question to be answered is whether, notwithstanding this omission, a reference may be ordered to take the testimony in relation to the allegations of the petition or answer and report the same to the court without opinion. It is to be observed at the outset that the Liquor Tax Law, so known by its short title, is an act entitled "in relation to the traffic in liquors, and for the taxation and regulation of the same, and to provide for local option, constituting chapter 29 of the General Laws." In other words, the traffic in liquors, its taxation and regulation, is governed by this act and confers upon the courts additional powers in order to carry the same into effect. The revocation and cancellation of a liquor tax certificate for cause is a procedure regulated entirely by the

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act in question. The certificate issued under this act differs essentially in details, to which reference need not now be made, from the former license, so called, that was given to the citizen desiring to traffic in the sale of spirituous liquors.

This court held in *Matter of Lyman* (160 N. Y. 96) that a liquor tax certificate constitutes, under the present law, a species of property transferable by the party procuring the same, and that the privilege or right which it confers upon the holder cannot be revoked except in the manner and for the causes prescribed in the statute.

It follows that the power to appoint a referee to take testimony in a proceeding to revoke and cancel a liquor tax certificate must be found in the statute to which reference has been made. The situation presented is exceedingly simple, involving no difficult question of construction. The sentence we are considering, unamended, required the court, on the return of the order to show cause, to hear the proofs of the parties, or to direct a referee to take the same and report without opinion. The sentence, as amended, requires the court, on the return of the order to show cause, to hear the proofs of the parties in relation to the allegations of the petition or answer. The power to refer the taking of proof is omitted, and it must be assumed under the circumstances that the legislature intended to change the practice in this regard. It is difficult to see how any other conclusion could be reached as a mere matter of construction and without regard to adjudication bearing upon the question.

In *Matter of Prime* (136 N. Y. 347) it was held that when a statute amends a former statute "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law and all provisions therein omitted in the latter.

It is true that this rule is not to be regarded as absolute and unyielding where the surrounding circumstances are such as to qualify it. In the case at bar there are no such circumstances as to prevent the application of the well-established rule. On the contrary, it is quite possible that the legislature

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may have become satisfied that references were too slow and expensive, thereby preventing the speedy and economical enforcement of the statute. If the omission of the power to refer was accidental, the legislature can readily cure it.

It was urged upon the argument, and in the opinions of the Appellate Division in other cases, in support of the power to refer under the section as amended, especially in the first department, that the crowded condition of the calendars was such it would be manifestly impossible to dispose of applications under this statute in a summary manner unless the appointment of a referee was permitted. It is suggested that this condition was known to the legislature, which is undoubtedly so and renders it clear that the legislature intended to abolish references in these proceedings.

The orders appealed from should be reversed, with costs. The question certified is answered in the negative.

CULLEN, Ch. J., HAIGHT, VANN, WERNER and HISCOCK, JJ. concur; WILLARD BARTLETT, J., not voting.

Orders reversed.

In the Matter of the Application of THE TROY PRESS COMPANY, Respondent; for a Writ of Mandamus against ELIAS P. MANN, as County Treasurer of Rensselaer County, Appellant.

TAX — PUBLICATION OF NOTICES OF TAX SALES AND NOTICES OF REDEMPTION THEREOF IN CITY OF TROY AND COUNTY OF RENSSELAER — LOCAL STATUTES REGULATING PUBLICATION REPEALED BY IMPLICATION BY ACT FOR GOVERNMENT OF CITIES OF SECOND CLASS AND GENERAL TAX LAW. By the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch. 581) pertaining to the sale of lands for unpaid taxes and the redemption thereof within cities of the second class, and by the provisions of the Tax Law (L. 1896, ch. 908) pertaining to the sale and redemption of lands in a county, outside of any cities situated therein, there is provided a complete and harmonious system and method of procedure, which supersedes and by implication repeals the special statutes (L. 1860, ch. 236; L. 1885, ch. 461, as amd. by L. 1892, ch. 512) requiring the publication of notices of tax sales, and notices of redemption from tax sales, of lands within the city of Troy, a

city of the second class, and lands within the county of Rensselaer, to be published in newspapers, published in the city of Troy and in other places in the county of Rensselaer, annually designated by the board of supervisors at the fall session thereof; so that such notices relating to lands within the city of Troy must now be published, under the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch. 581, §§ 29 and 313), in newspapers published in said city and designated as the official newspapers thereof by the common council, at its first meeting after the election of its members; and such notices relating to lands in the county of Rensselaer, outside the city of Troy, must be published, under the provisions of the Tax Law (L. 1896, ch. 908, §§ 151, 180), in the newspapers designated for the publication of the Session Laws.

Matter of Troy Press Co., 115 App. Div. 25, affirmed.

(Argued January 8, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 29, 1906, which reversed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the appellant herein to deliver to the petitioner orders for the publication of certain notices of sale of land for non-payment of taxes and notices of redemption of lands previously sold.

It was claimed by the petitioner that it was entitled to publish the notices by reason of the facts, *first*, that it was an official newspaper of the city of Troy, designated as such by the common council under section 29 of the Second Class Cities Law, and that under section 313 of that law these notices, in so far as they affect lands in said city, should be published in such official newspapers; and, *second*, that from 1903 to 1906, both inclusive, it was designated by the majority of the Democratic members of the board of supervisors of Rensselaer county, under the provisions of section 19 of the County Law, as the newspaper representing their political party, to publish the Session Laws and concurrent resolutions of the legislature; and, therefore, under the Tax Law of 1906 these notices, so far as they affect lands without the cities, should be published in that paper. Further facts appear in the opinion.

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Points of counsel.

Lewis E. Griffith for appellant. The *Troy Daily Press* not having been designated as county newspaper pursuant to chapter 512 of the Laws of 1892 is not authorized in law to print notices of tax sales and notices of redemption therefrom. (*F. A. Bank v. Colgate*, 120 N. Y. 381; *Sedg. on Stat. Law* [2d ed.], 325.) The provisions of the Tax Law and the amendment to the charter for cities of the second class did not directly or impliedly repeal the special laws relating to the collection of taxes and designation of official newspapers in Rensselaer county. (*F. A. Bank v. Colgate*, 120 N. Y. 381; *Matter of Huntington*, 168 N. Y. 399; *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259; *People v. Quigg*, 59 N. Y. 83; *People ex rel. Kingsland v. Palmer*, 52 N. Y. 88; *People ex rel. Strough v. Canvassers*, 77 Hun, 372; *E. P. Co. v. Lacey*, 63 N. Y. 422.) The legislature having provided a special rule for tax sales for state and county taxes within the county of Rensselaer and for advertising the same, a general statute thereafter enacted, though broad enough in its terms to be applicable to the case, will not from that fact alone alter the special rule, but it will stand unless expressly repealed, or the legislative intent to repeal is clearly manifested. (*People ex rel. Leet v. Keller*, 157 N. Y. 97; *McKenna v. Edmundstone*, 91 N. Y. 231; *Vandenburg v. Vil. of Greenbush*, 66 N. Y. 1; *Matter of Evergreens*, 47 N. Y. 216.)

William J. Roche for respondent. The Tax Law governs as to the newspapers in which shall be published notices of sales for unpaid county and state taxes and redemption therefrom, as to all lands situate in the county of Rensselaer, except in the cities of Troy and Rensselaer, and supersedes all the earlier local statutes upon the subject. (*Matter of Dobson*, 146 N. Y. 357; *Matter of N. Y. Institution*, 121 N. Y. 234; *Johnson v. H. R. R. Co.*, 49 N. Y. 445; *Barker v. Town of Floyd*, 61 App. Div. 92; *People ex rel. Catholic Union v. Sayles*, 32 App. Div. 203; *Matter of Huntington*, 168 N. Y. 399; *Pratt Inst. v. City of New York*, 183 N. Y.

151; *Rose v. Northrup*, 41 Misc. Rep. 238.) The Second Class Cities Law is controlling as to the newspapers for the publication of all such notices as to land situate in Troy, and in that particular supersedes all the earlier statutes upon the subject. (*People v. Mayor, etc.*, 32 Barb. 102; *Matter of Troy Press Co.*, 94 App. Div. 514, 519; 179 N. Y. 529; *Hickman v. Pinkney*, 81 N. Y. 211; *People ex rel. Fleming v. Dalton*, 158 N. Y. 175; *People ex rel. Gress v. Hilliard*, 85 App. Div. 507; *The Paquete Habana*, 175 U. S. 677; *People ex rel. Morrissey v. Boland*, 35 Misc. Rep. 117; *People ex rel. Gaffigan v. Rickerson*, 56 App. Div. 588.)

HAIGHT, J. The right of the relator to the order called for in his petition for a writ of mandamus depends upon the question as to whether chapter 236 of the Laws of 1860 and chapter 461 of the Laws of 1885, as amended by chapter 512 of the Laws of 1892, remain in force or have been repealed by implication by chapter 182 of the Laws of 1898, as amended by chapter 581 of the Laws of 1899, known as the Second Class Cities Law, and by chapter 908 of the Laws of 1896, which is known as the General Tax Law. The county treasurer of Rensselaer county issued his certificate for publication of notices of tax sales of lands and notices of redemptions from sales made pursuant to the provisions of the former statutes, which were special acts applicable to the city of Troy and the county of Rensselaer, and if those statutes remain in force then the relator is not entitled to the relief demanded by him. If, however, the special acts have been superseded or impliedly repealed by the Second Class Cities Law, which is in force in the city of Troy, and the General Tax Law, which is in force in the county of Rensselaer, then the relator is entitled to the order called for.

Under the special acts mentioned the board of supervisors of Rensselaer county is required annually at its fall session to designate as county papers two daily newspapers of opposite politics published in Troy; also two weekly newspapers having the largest circulation therein, and one weekly newspaper

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published in the town of Hoosick, and also one weekly newspaper printed in the town of Greenbush, in which every advertisement chargeable to the county shall be advertised, except the Session Laws.

Under the act for the government of cities of the second class it is provided by section 29 that at the first meeting of the common council after the election of its members it shall by a *viva voce* vote designate two daily newspapers published in the city to be the official papers of the city; each member shall be entitled to vote for one of the papers and the two papers having the highest number of votes shall be the official papers for two years and until others are designated. By section 313, which was inserted by chapter 581 of the Laws of 1899, it is provided that "in all cases where county and state taxes, which have been levied upon real estate in any city shall remain unpaid after the time when the same should have been paid, notice of the sale of lands situate in the city for such unpaid taxes, shall be published in the official newspapers of the city, in the same manner that is prescribed in existing laws with reference to sales of lands for unpaid city taxes. Where notice of redemption from such sales for unpaid county and state taxes affecting real estate situated in any city shall be required by law to be published, the same shall be published in the official newspapers of the city in the manner and for the time required by law." It will thus be observed that under the local acts the papers are to be designated by the board of supervisors, while under the act for the government of cities of the second class they are to be designated by the common council of the city. These provisions are inconsistent and may result, as they have in this case, in the selection of different papers. Under the provisions of the Second Class Cities Law all statutes of the state and ordinances of cities, so far as inconsistent with the provisions of the act, are repealed. The Constitution of the state has divided the cities into three classes, first, second and third. As to the cities of the second class the legislature has seen fit to enact a general law for the government of those cities. The city of

Troy is a city of that class, and, therefore, the law applies to it. One of the purposes sought to be accomplished by the dividing of the cities of the state into classes and the adopting of general laws for the government of such cities as are embraced in one of the classes was to obviate special laws and to simplify government and procedure by establishing uniform laws.

Under the General Tax Laws the county treasurer is required to publish the notices for tax sales and redemptions in the newspapers designated for the publication of the Session Laws (§§ 151 and 130). Here, again, we have provisions which are inconsistent with those of the local acts pertaining to the county of Rensselaer which often may result, as they have in this case, in the selection of different papers. We thus have the same question presented with reference to the repeal by implication of the local acts that is presented by the act for the government of the cities of the second class, to which we have already referred. The General Tax Law was prepared by the commissioners of statutory revision, who, in reporting it to the legislature, stated that they had gone over the entire field of statutory law relating to taxation, and without intending to effect radical changes had made various alterations in order to eliminate the inconsistencies and reduce the subject to a harmonious system. The provisions of this act have been under consideration in this court in several cases. It was first up in the case of *People ex rel. Catholic Union v. Sayles* (32 App. Div. 203), in which LANDON, J., in delivering the opinion of the court, speaking of this law, said that the intention of the legislature was influenced by the mass of special legislation upon the subject and by the need of a uniform system. This case was affirmed upon the opinion in the Appellate Division (157 N. Y. 679). It was again considered in *Matter of Huntington* (168 N. Y. 399), in which it was stated in substance in the prevailing opinion that we did not think there was any escape from the conclusion that the Tax Law was a revision and substitute for all former statutes, general and special, upon the subject. Again, in *Pratt Insti-*

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tute v. City of New York (183 N. Y. 151), VANN, J., said : "It is a codifying act designed to reduce all statutes relating to taxation into a complete and harmonious system. A codifying act is presumed to exhaust the subject to which it relates, unless a different intention appears on the face of the statute or is an irresistible inference from special circumstances. The new enactment is substituted in place of all statutes previously existing, and becomes the sole rule of action." (See Sutherland on Statutory Construction [Lewis ed.], §§ 269, 270; *King v. Cornell*, 106 U. S. 395; *Tracy v. Tuffy*, 134 U. S. 206, 223; *State v. Wilson*, 43 N. H. 415, 419; *Bartlet v. King*, 12 Mass. 537, 545.) It is true that in these cases to which we have referred in this court we had under consideration other provisions of the Tax Law, but what was therein stated with reference to the purposes of the act is equally applicable to the provisions which we now have under consideration, and we think they are controlling upon the question now presented. The provisions of the Cities Law only embraced sales and redemptions of lands located within the city. The provisions of the General Tax Law pertain to the sale and redemption of lands in the county outside of the city. Together they provide for a complete and harmonious system of taxation and procedure. They exhaust the subject to which they relate, and irresistibly lead to the inference that the legislature intended that they should become a substitute in place of the local previously existing statutes. We, therefore, conclude that the case was properly disposed of in the Appellate Division.

The order should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

In the Matter of the Application of I. NEWTON WILLIAMS,
Appellant, to Enforce an Attorney's Lien.

HENRY BISCHOFF et al., as Executors and Trustees under the
Will of HENRY BISCHOFF, Deceased, Respondents.

ATTORNEY AND CLIENT — LIEN FOR SERVICES IN PROCURING PAYMENT TO BENEFICIARY OF INCOME OF TRUST FUND ESTABLISHED FOR HIS SUPPORT AND EDUCATION — CODE CIV. PRO. § 66. The income from a trust fund directed to be paid over to the beneficiary for the support and education of the beneficiary and his family, although exempt from the claims of general creditors so far as it is required for his support, is not exempt from a claim for necessary services rendered by an attorney employed by him to compel a trustee refusing to do so, to pay over the income necessary for his support, and who, for that purpose, has instituted proceedings in a Surrogate's Court; under section 66 of the Code of Civil Procedure such attorney has a lien for the reasonable value of his services in procuring the amount of income withheld, but not for services rendered in and about the estate for other relief.

Matter of Bischoff, 114 App. Div. 904, reversed.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1906, which affirmed an order of the New York County Surrogate's Court denying an application for the establishment of an attorney's lien.

The facts, so far as material, are stated in the opinion.

I. Newton Williams, appellant, in person. The appellant has a lien under section 66 of the Code of Civil Procedure. (*Matter of Fitzsimons*, 174 N. Y. 20; *Matter of Regun*, 167 N. Y. 338; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521; *Goodrich v. McDonald*, 112 N. Y. 163; *Matter of King*, 168 N. Y. 58; *Bailey v. Murphy*, 136 N. Y. 50; *Lyddy v. Long Island City*, 104 N. Y. 221; *Boyle v. Boyle*, 106 N. Y. 654; *Puelt v. Beard*, 86 Ind. 172.)

John A. Straley for respondents. The income provided for the benefit of petitioner's clients under the terms of testator's

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will being inalienable or unassignable by them, petitioner can have, neither by statute nor at common law, a lien thereon. (*Dittmar v. Gould*, 60 App. Div. 94; *Ward v. Boice*, 152 N. Y. 191; Code Civ. Pro. §§ 1871-1879; *Butler v. Baudouine*, 84 App. Div. 215; *Schenck v. Barnes*, 156 N. Y. 316; *Cochrane v. Schell*, 140 N. Y. 516; *Matter of Hoyt*, 12 Civ. Pro. Rep. 208; *Tolles v. Wood*, 99 N. Y. 617; *Noyes v. Blake-man*, 6 N. Y. 567.) In no event could any creditor, even a judgment creditor, reach more of this income than that in excess of a sufficient sum for the support of the beneficiary, his wife and family. (*Butler v. Baudouine*, 84 App. Div. 215; *F. Nat. Bank v. Miller*, 24 App. Div. 551; *Everett v. Peyton*, 167 N. Y. 117; *Schuler v. Post*, 18 App. Div. 374; *Dittmar v. Gould*, 60 App. Div. 94; *N. A. T. Co. v. Aymer*, 33 Misc. Rep. 576; *Brown v. Barker*, 68 App. Div. 592; *Schenck v. Barnes*, 156 N. Y. 316.) The court below had no power to determine the lien of Williams in the absence of a judgment in his favor. (Code Civ. Pro. § 66; *Matter of Regan*, 167 N. Y. 338; *Matter of Pieris*, 82 App. Div. 466; *Matter of Rowland*, 55 App. Div. 66; *Bailey v. Murphy*, 136 N. Y. 50.)

HAIGHT, J. The moving papers tend to show that Henry Bischoff died, leaving a last will and testament, which had been duly admitted to probate, in which he created a trust of a portion of his estate for the benefit of his son, Franklin J. Bischoff, his wife and children, and in which the respondents were appointed executors and trustees, with directions to invest and re-invest the same and "pay to my said son Franklin J. Bischoff, or to his wife, for his benefit or of his family, for his support and the support of his wife and children during his life, the net income thereof." Under this provision the trustees had paid over to Franklin the sum of one hundred and twenty-five dollars a month for the support of himself and family out of the income of the trust estate, reserving in their hands the surplus income over and above the monthly payment, which amounted to about the sum of twenty-five

hundred dollars. In October, 1904, Williams, the applicant, who was an attorney at law, was retained by Franklin J. Bischoff and his wife to obtain an intermediate accounting by the executors and trustees of his father's will, and to compel the payment over to them of the income arising from the trust estate which had accumulated in their hands. There upon proceedings were instituted by him to obtain such relief, which finally resulted in a decree entered by the surrogate, upon the consent of the parties, by which the twenty-five hundred dollars income accumulated in the hands of the trustees was directed to be paid over to Franklin J. Bischoff and wife for their support and maintenance. Thereupon Williams served upon the trustees and their attorney a notice of his lien for services rendered, which he, by this proceeding, seeks to have established and paid. The surrogate denied his application and dismissed the proceedings, upon the ground, as stated in his opinion, that the beneficiary of the trust had no power to create a lien upon the income, and, therefore, the attorney did not obtain a lien thereon by virtue of his retainer.

The income derived from the trust estate, in so far as it was necessary for the support and education of Franklin, his wife and children, was inalienable, unassignable and not subject to process on behalf of creditors. But under our statute "where a trust is created to receive the rents and profits of lands and no valid direction for the accumulation is given the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable *in equity* to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law." This provision of the statute has been held to apply to trusts created of personal property. (*Dittmar v. Gould*, 60 App. Div. 94.) In view of this provision of the statute it has been suggested that the Surrogate's Court had no jurisdiction to determine the claim of Williams, for the reason that the surplus income over and above that which was necessary for the support and education of Franklin and his family

could only be reached *in equity*. This would, doubtless, be the case if the attorney, as a general creditor, was endeavoring to reach such surplus, but such is not his position here. In the proceeding instituted by him it has been adjudged and determined that the twenty-five hundred dollars accumulated in the hands of the trustees was necessary for Franklin's support and that of his family, and, therefore, there is no surplus which the creditors could reach in equity. The only question, therefore, presented is as to whether the income from the trust estate, which was necessary for the support and education of Franklin and his family, which is exempt as to the claims of creditors, is also exempt as to the claims of Williams.

The Code of Civil Procedure, section 66, which, so far as is important to be now considered, provides as follows: "From the commencement of an action or special proceeding * * * the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien." This provision of the Code pertaining to special proceedings applies to proceedings in Surrogates' Courts and gives an attorney a lien upon his client's claim for services rendered in compelling an accounting by executors and administrators. (*Matter of Fitzsimons*, 174 N. Y. 15, and *Matter of Regan*, 167 N. Y. 338.) Does it also give a lien for services rendered in collecting the income derived from a trust estate, is the additional question now presented.

In *Estate of Hoyt* (12 Civ. Pro. R. 208), ROLLINS, Surrogate, in substance held that an attorney's lien for services rendered upon a contest over the admission to probate of a will did not attach to the income of a trust estate created for the benefit of a daughter, for the reason that no person beneficially interested in a trust for the receipt of rents and

profits can assign or in any manner dispose of such interest ; that a person to whom such person is indebted may in a court of general equity jurisdiction and not elsewhere, in a proceeding where the issue is directly made as to the amount necessary for the debtor's support and not otherwise, reach any trust income belonging to the debtor, in excess of the sum necessary for the education, support and maintenance of himself and family.

In the case of *Noyes v. Blakeman* (6 N. Y. 567) it was held that an attorney who defends a suit affecting the validity of a trust, at the request of the *cestui que trust* without the concurrence of the trustee, cannot reach the surplus income of the trust estate under section 57 of the statute relative to uses and trusts to pay the costs of such defense, for the reason that he is not a creditor of the *cestui que trust* within the meaning of that statute ; that it was the duty of the trustee to use reasonable diligence to protect the trust estate and he would have a lien upon it for the expenses of such protection.

In *Tolles v. Wood* (99 N. Y. 616) the action was brought by a judgment creditor in equity to procure the payment of his judgment out of the surplus income beyond what was necessary for the suitable support and maintenance of the *cestui que trust* and it was held that he could recover, inasmuch as it was determined that the surplus was sufficient to pay such judgment.

Our attention has been called to other cases, but to none which seem to cover the question here presented. They, however, are to the effect that, in so far as the attorney has become a general creditor of the *cestui que trust* on account of services rendered in other proceedings and litigations, no lien would attach to the income from the trust estate which was necessary for his support and education. But in this case we have one distinguishing feature, and that is, the trustees refused to pay over to the *cestui que trust* the income derived from the trust estate which was necessary for his support and education. It was to compel them to pay over this fund that proceedings were instituted by this attorney. Under the pro-

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visions of the Code, to which we have referred, he is given a lien upon his client's claim. The claim was for the twenty-five hundred dollars improperly retained by the trustees as was finally determined by the decree entered in those proceedings. The lien attached to such fund and when he succeeded in obtaining a decree for its payment to his clients he became entitled, upon giving the notice required, to have his lien protected. It is true that this twenty-five hundred dollars was income and necessary for the support and education of Franklin, his wife and children. It is also true that he could not assign or otherwise dispose of it and that it could not be reached by creditors; but he was insolvent, the trustees would not pay it over; he was compelled to resort to proceedings to obtain it and attorneys could not be compelled to do the work gratuitously. We, therefore, are of the opinion that in so far as Williams, as his attorney, rendered necessary services in procuring this income he, under the express provisions of the Code, became entitled to a lien thereon for the reasonable value of his services, although it was exempt as to claims of general creditors. Were we to hold otherwise it might operate to deprive a beneficiary of the aid of counsel and the power to collect the income due him. It is not pretended that Franklin made any contract to sell or dispose of his beneficiary interest in the trust estate. He has not made any contract as to the amount that should be paid to his attorney for collecting the income. He only engaged counsel to recover the amount due him. The income was his claim — his demand. It was his cause of action, referred to in the Code. The services of his attorney were necessary for the protection of his right to the income and its payment over to him. The compensation for the services rendered by his attorney was a part of the necessary expenses incurred in making the collection, like a pension, exempt as to creditors but chargeable with the expenses of collection. The proceeding to enforce the payment by the trustees of the income over to Franklin or his wife was instituted in the Surrogate's Court. No question is raised as to the jurisdiction of that court over

Dissenting opinion, per EDWARD T. BARTLETT, J. [Vol. 187.

the matter or as to the validity of the decree entered by it. The proceeding now under review only called for a determination of fact as to the value of the services necessarily rendered by the attorney and a conclusion of law as to whether a lien attached for the value thereof to the fund recovered. This case differs from that of *Sherman v. Skuse* (166 N. Y. 345) in which the income from the trust estate created for the benefit of a son was directed to be used, so far as necessary for his support, instead of being paid over to him. Under that provision it was held that equity would compel the payment by the trustees for the services of a doctor necessarily rendered for his benefit. In this case the amount of income in the hands of the trustees has been determined and ordered to be paid over to Franklin. The trustees are given no control over the manner in which it shall be expended by Franklin. We, therefore, conclude that it was not necessary to resort to an expensive action in equity, but that the lien of the applicant could be determined summarily under the provision contained in the section of the Code referred to. In so far, therefore, as services were necessarily rendered by Williams in procuring the payment over of the twenty-five hundred dollars income, he should have the amount of his claim determined and his lien therefor established, but not for services rendered in and about the estate for other relief.

The order of the Appellate Division and that of the surrogate should be reversed and the proceeding remitted to the Surrogate's Court to proceed thereon, costs to abide the final determination of the proceeding.

EDWARD T. BARTLETT, J. (dissenting). I am of the opinion that the attorney acquired no lien on the accumulated income in the hands of the trustees by section 66 of the Code of Civil Procedure. The fact that the services were rendered to the beneficiary in order to secure the payment of accumulated income makes no difference.

Where the beneficiary under a trust is indebted for services

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Statement of case.

rendered him by counsel relating to the trust, the remedy of the latter is exclusively in a court of general equity jurisdiction. The issue there to be tried is the necessary amount for the support of the beneficiary and his dependent family. It is only the surplus income that can be devoted to payment of counsel. The beneficiary is entitled to litigate this question in a court of equity. (*Tolles v. Wood*, 99 N. Y. 616.)

I vote for affirmance.

VANN, WILLARD BARTLETT and HISCOCK, JJ., concur with HAIGHT, J.; EDWARD T. BARTLETT, J., reads dissenting memorandum, with whom CULLEN, Ch. J., and WERNER, J., concur.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v.
MERCHANTS' TRUST COMPANY, Defendant.

JACOB L. PHILLIPS et al., as Stockholders of the MERCHANTS' TRUST COMPANY, Appellants; VICTOR C. PEDERSEN et al., as Depositors of the MERCHANTS' TRUST COMPANY, Respondents.

CORPORATIONS — INTEREST UPON CLAIMS OF CREDITORS OF INSOLVENT TRUST COMPANY — CONTRACT RATE BEFORE, LEGAL RATE AFTER THE APPOINTMENT OF RECEIVER. In an action brought by the attorney-general to wind up the affairs of an insolvent trust company, interest should be allowed to creditors having special interest contracts with the company at the contract rate to the date the receiver takes possession of its assets; thereafter interest is allowable against the company, if the assets are sufficient after payment of the principal of the indebtedness, as established at the time the receiver took possession, and should be paid at the legal rate before the distribution of the surplus to stockholders.

People v. Merchants' Trust Co., 116 App. Div. 41, affirmed.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL, by permission; from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 28, 1906, which affirmed an order of Special Term directing the receivers of the defendant to pay interest upon the claims of creditors. The following questions were certified :

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PHILIP V. MERCHANTS' TRUST CO.
Points of counsel.

"I. Are depositors and holders of certificates of deposit, having special interest contracts with the Merchants' Trust Company, entitled to payment, in addition to the amounts already paid to them respectively, of any interest whatever upon the principal of their deposits, after May 23, 1905, the date of the appointment of the receivers of said Merchants' Trust Company; and, if so, are they entitled to interest at the contract rate or at the legal rate?"

"II. Are depositors and holders of certified checks, having no interests contracts with the Merchants' Trust Company, entitled, in addition to the sums already received by them, to wit: the full amount of the principal of their claims, to interest upon their respective credit balances and sums owing them after May 23, 1905?"

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis Marshall, Lawrence Arnold Tanzer and Abraham Benedict for appellants. The depositors made no demand for the payment of their deposits of the corporation. Its property was taken into custody by the Supreme Court. The payment of the depositors being thus deferred by the operation of the law they are not entitled to interest after the date of the appointment of the receivers. (*Sickles v. Herold*, 149 N. Y. 332; *People v. C. S. Bank*, 6 Misc. Rep. 319; *Thomas v. W. C. Co.*, 149 U. S. 95; *G. T. Ry. Co. v. C. V. Ry. Co.*, 90 Fed. Rep. 163; 91 Fed. Rep. 569; *Hutchinson v. Otis*, 115 Fed. Rep. 937; *Solomons v. Am. B. & L. Assn.*, 116 Fed. Rep. 676; *S. T. Co. v. K. C., etc., Co.*, 129 Fed. Rep. 455; *Bowman v. Wilson*, 12 Fed. Rep. 864; *People v. A. L. & T. Co.*, 70 App. Div. 579.) At all events interest should not be allowed to the depositors beyond the contract rate. (*Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeek*, 4 Cow. 496; *Sullivan v. Fosdick*, 10 Hun, 181; *Andrews v. Keeler*, 19 Hun, 87; *Corning v. Pond*, 29 Hun, 129; *Ritter v. Phillips*, 53 N. Y. 589; *Genet v. Kas-*

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sam, 21 J. & S. 43; *Patterson v. Graham*, 16 N. Y. S. R. 703; *Association Bank v. Eagleston*, 60 How. Pr. 9; *E. I. & S. R. M. Co. v. City of Elmira*, 5 Misc. Rep. 194.)

Theodore Sutro, Boardman Wright and Ralph Barnett for Victor C. Pedersen, respondent. Depositors in the defendant Merchants' Trust Company, having special interest contracts or not, are entitled to interest upon the amount of their respective credit balances at the legal rate of six per cent from the time of its suspension and appointment of temporary receivers for it up to the date of payment of the final dividend upon the principal of their deposits. (*C. Nat. Bank v. Bailey*, 12 Blatchf. 480; *McGowan v. McDonald*, 111 Cal. 57; *Matter of Hagan*, 6 Benedict, 407; *Matter of Murray*, 6 Paige, 204; *Lloyd v. Preston*, 146 U. S. 630; *Scott v. Morris*, 9 S. & R. 123; *Green v. Abbott*, 2 Root, 242; *Brown v. Lamb*, 6 Metc. 203; *Bowers v. Hammond*, 139 Mass. 363.)

Joab H. Banton and James I. Moore for depositors, respondents. If the assets of a banking corporation are sufficient to pay all its creditors in full, including interest on their claims, interest must be paid, for, as against the corporation itself, interest should be allowed the creditors before the return of any surplus to the stockholders. (*People v. A. L. & T. Co.*, 172 N. Y. 371; *Sickles v. Herold*, 149 N. Y. 332; *Mahoney v. Bernhard*, 45 App. Div. 499; 169 N. Y. 589; *Barnes v. Arnold*, 23 Misc. Rep. 197; 45 App. Div. 314; 169 N. Y. 611; *Wheeler v. Miller*, 90 N. Y. 353; *Richmond v. Irons*, 121 U. S. 64; *Williams v. American Bank*, 4 Metc. 317; *Parker v. Adams*, 38 Misc. Rep. 325; *Nat. Bank of Comm. v. M. Nat. Bank*, 94 U. S. 437; *Scott v. Morris*, 9 S. & R. 123.)

HAIGHT, J. The defendant was a corporation organized under the laws of this state and engaged in the business of a banking and trust company. On or about the 23d day of

May, 1905, this action was brought by the attorney-general, in which judgment was demanded that the corporation be dissolved and its assets distributed, upon the ground that it had become insolvent and its capital stock impaired. On that day a temporary receiver was appointed to take possession of the assets of the defendant, and subsequently, and on the 24th day of June, 1905, a final judgment was entered dissolving the corporation and appointing permanent receivers to wind up its affairs. Thereupon the receivers so appointed entered upon the discharge of their duties as such, converted the assets into money and from time to time paid dividends to the creditors under the direction of the court upon the principal of such indebtedness, reserving to such creditors the right to petition the court on or before final accounting of the receivers for such relief as they may consider themselves entitled to concerning the allowance of interest upon their claims. The creditors having been paid in full for the amount of their principal indebtedness and there remaining a surplus of about \$175,000, a petition was presented to the court for instructions with reference to the payment of interest upon such indebtedness, and thereupon the Special Term made an order instructing the receivers: 1. "To pay to those depositors having special interest contracts with the defendant, interest at the rate provided for in said contracts respectively, from January 1st, 1905, to and including May 23rd, 1905, and thereafter upon their respective balances up to the date of final payment of principal at the legal rate of interest. 2. To pay to those depositors having no interest contracts with the defendant, interest upon the amount of their respective credit balances from May 23rd, 1905, up to the date of final payment of principal at the legal rate of interest. 3. To pay to holders of certificates of deposit the amount of interest, if any, specified in their respective certificates from the day of the last payment of interest thereon up to and including May 23rd, 1905, at the rate specified in their respective certificates, and thereafter upon the respective credit balances due to them up to the date of final payment of

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principal, at the legal rate of interest. 4. To pay to holders of certified checks interest upon the amount of their respective credit balances from May 23rd, 1905, up to the date of the final payment of principal, at the legal rate of interest."

It further appears that during the time that the defendant was engaged in conducting its banking business it had contracts with some of its depositors and certificate holders, by which it had agreed to pay interest ranging from two to four per cent.

The final judgment entered in this action dissolving the corporation adjudged that it was insolvent and that its capital stock had been impaired. Such adjudication related back to the date when the temporary receiver was appointed and took possession of the assets of the corporation. (*People v. Am. Loan & Trust Co.*, 172 N. Y. 371; *People v. Commercial Alliance L. Ins. Co.*, 154 id. 95, 96; *People ex rel. Atty. Genl. v. Life & Reserve Assn. of Buffalo*, 150 id. 94; *Matter of Equitable Reserve Fund Life Assn.*, 131 id. 354.) The appointment of the temporary receiver and the taking possession of the assets by him operated to prevent the defendant from paying the claims of the creditors, and thereby obviated the necessity of a formal demand for payment on their part. (*Richmond v. Irons*, 121 U. S. 27, 64; *Sickles v. Herold*, 149 N. Y. 332.) That interest was chargeable at the contract rate upon the claims of depositors and certificate holders down to the date of the appointment of the receiver and of his taking possession of the assets of the defendant does not appear to be questioned. But it is contended that after that event no interest whatever was chargeable as against the defendant or its stockholders. We think, however, that this court is committed to the doctrine that interest is allowable if the assets are sufficient to pay the same. In the case of *People v. American Loan & Trust Co.* (*supra*), VANN, J., in delivering the opinion of the court, said: "If the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders." It may be

admitted that these remarks were unnecessary to the disposition of the case then under consideration, but the rule thus asserted appears to us to be so eminently just and so well supported by other authority that we now have no hesitancy in adopting it as the rule that should be adhered to in disposing of questions of this character. It is not only in accord with the views expressed in the case of *Sickles v. Herold* (*supra*), but with those expressed in *National Bank of Commonwealth v. Mechanics' National Bank* (94 U. S. 437); *Richmond v. Irons* (121 id. 64); *Mahoney v. Bernhard* (45 App. Div. 499; *affd.*, 169 N. Y. 589), and *Wheeler v. Millar* (90 N. Y. 353, 363).

The only other question which we are called upon to consider is that pertaining to the rate of interest that should be allowed after the appointment of the receiver. After the receiver had taken possession of the assets of the company under such appointment, as we have seen, the corporation became powerless to carry out its contracts with the depositors to repay their money to them upon demand. The depositors thereby had their right of withdrawal and payment taken from them. The company, owing to its inability to pay, became chargeable with a breach of its contracts, thus terminating its right under the existing contracts and investing its depositors with all the rights given by law to persons whose contracts have been broken. To continue the interest at the contract rate would be manifestly unjust to the creditors, for the rates allowed under the contracts varied, as we have seen, from two to four per cent, and it would, therefore, favor one class at the expense of the other. We think, therefore, that when the contracts with creditors were broken by the defendant becoming insolvent and the appointment of a receiver, so that it was unable to perform its agreements, the legal rate of interest became the rate to which all the creditors were thereafter entitled, and it should be paid by the receivers if the assets are sufficient. It consequently follows that in an action brought by the attorney-general to wind up the affairs of an insolvent bank, that interest at the contract rate should be

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allowed and credited upon the accounts of its creditors to the date that the receiver took possession of its assets; that thereafter interest is not allowable as between the creditors themselves, but is allowable against the corporation; and if the assets are sufficient after payment of the principal of the indebtedness, as established at the time the receiver took possession, the interest should be paid at the legal rate before the distribution of the surplus to the stockholders.

The order appealed from should, therefore, be affirmed, and the first question certified answered in the affirmative at the legal rate, and the second in the affirmative, with costs to respondents filing briefs in this court, payable out of the fund.

CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

THE BELL TELEPHONE COMPANY OF BUFFALO, Respondent, v.
ALBERT H. PARKER et al., Appellants.

1. CONDEMNATION PROCEEDINGS — OBJECTION BY PROPERTY OWNER. While there is no specific provision in the Condemnation Law (Code Civ. Pro. § 3357 *et seq.*) for questioning the sufficiency of a petition in condemnation proceedings by objection on the part of the property owner, such method of procedure has been sanctioned by the courts for many years.

2. PROPERTY OR INTEREST TO BE CONDEMNED MUST BE ACCURATELY DESCRIBED IN PETITION. It is not enough in a proceeding to condemn an interest in land for public purposes to describe the interest sought to be acquired so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the quantum of the interest which it may be deemed necessary to take.

3. SAME — TELEPHONE LINE — PROCEEDING TO ACQUIRE RIGHT TO TRIM TREES IN ORDER TO PROTECT LINE FROM INTERFERENCE — WHEN PETITION INSUFFICIENT. Where a petition in condemnation proceedings, instituted to acquire title to certain property, describes the property to be taken as "an easement or right of way for the erection, maintenance and operation of a line of telephone, said line to consist of" a designated number of poles, to be set at designated places, with the right to attach the necessary wires or cables thereto, "and with the right to trim such trees as may be necessary to protect said line from interference," the petition is insufficient because it fails to describe the property, rights and ease-

ments sought to be acquired with sufficient particularity to be a compliance with the provisions of the Condemnation Law (Code Civ. Pro. § 8360, sub. 2), in that it is not sufficiently specific in stating the extent of the right which the petitioner desires to acquire "to trim such trees as may be necessary to protect said line from interference;" since the precise distance to which such trees must be trimmed to maintain the safety of the line should be stated in the petition in order that the property owner may be informed in advance as to the extent of the interest which the condemning party seeks to acquire, and in order that the commissioners may be similarly guided in measuring their award.

Bell Telephone Co. v. Parker, 115 App. Div. 920, reversed.

(Argued January 11, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 10, 1906, which reversed an order of Special Term sustaining objections to the sufficiency of a petition in condemnation proceedings.

This is a special proceeding by a domestic telephone company under the Condemnation Law (Title 1 of chap. 23 of the Code of Civil Procedure) to acquire title to certain property of the defendants, which is described in the petition as follows: "An easement or right of way for the erection, maintenance and operation of a line of telephone through the public highway situate in the town of Pittsford, Monroe County, New York, commonly known as the Pittsford and Lima Road, which said highway passes through the premises hereinafter referred to; said line to consist of eight (8) poles, twenty-eight (28) feet, or thereabouts, above the surface of the ground, with seven (7) cross-arms each ten (10) feet in length, the lowest of said cross-arms to be at least eighteen (18) feet above the surface of the ground and each of said poles to be twelve (12) inches, or thereabouts, in diameter at the bottom and from six (6) to eight (8) inches in diameter at the top; with the right to trim such trees as may be necessary to protect said line from interference; with the right to attach the necessary wires or cables thereto. Said poles to be set at the places indicated on the annexed map which is hereby referred to and made a part of this petition."

A map was attached to the petition showing the points at which it was proposed to erect the telephone poles.

Objections were interposed in behalf of the defendants to the sufficiency of the petition, and upon a hearing at a Special Term of the Supreme Court in Monroe county the objections were sustained, with leave, however, to the plaintiff to serve an amended petition. The objections are not specifically set out in the appeal book, but it is apparent from the memorandum of decision filed at the Special Term, as well as from the order of the Appellate Division permitting the appeal, that the petition was adjudged insufficient because it did not contain a "specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty," as prescribed by the Condemnation Law (Code Civ. Pro. § 3360, sub. 2).

Upon appeal to the Appellate Division the order of the Special Term was reversed without opinion, and the Appellate Division has certified the following questions to this court:

"*First.* Does the petition in this proceeding sufficiently describe the property, right, interest or easement sought to be taken, to warrant a judgment of the court to be entered thereon, adjudging that the plaintiff in said proceeding has the right to the appointment of appraisers to determine the damages that should be awarded to the plaintiff?"

"*Second.* Does the petition in this proceeding describe the property, right and easements sought to be acquired with sufficient particularity to be a compliance with the Condemnation Law and other statutes of the State of New York?"

John D. Lynn for appellants. The description of the property sought to be taken is not sufficiently definite to authorize judgment in condemnation proceedings. (*S. C. T. Co. v. Gammons*, 113 App. Div. 766.) The petition must contain "a specific description of the property to be condemned and its location by metes and bounds with reasonable certainty." (Code Civ. Pro. §§ 3360, 3369, 3370.) This description is

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insufficient to confer jurisdiction upon the court. The owner is entitled to have an accurate, definite description of the amount of property he is to lose in this transaction, and nothing must be left open to the judgment or interpretation of some other, not even of a court. (*S. R. R. Co. v. Slade*, 36 App. Div. 587; *M. R. R. Co. v. Dominick*, 55 Hun, 198; *City of Syracuse v. Stacy*, 86 Hun, 441; *Matter of City of Buffalo*, 78 N. Y. 362; *Vandermullen v. Vandermullen*, 108 N. Y. 195; *Schneider v. Rochester*, 160 N. Y. 165; *Johnson v. Village of Whitney Point*, 102 N. Y. 81; *People v. Hynds*, 30 N. Y. 470; *Matter of Water Comrs.*, 96 N. Y. 360.)

John A. Barhite for respondent. The plaintiff has the right in its petition to adopt the language of the statute and have the allegations in the petition liberally construed. (*R. R. Co. v. Robinson*, 133 N. Y. 242; *Matter of Met. El. R. R. Co.*, 12 N. Y. Supp. 506; *Satterly v. Winne*, 101 N. Y. 218.)

WILLARD BARTLETT, J. The learned judge who heard this case at Special Term expressed the opinion that the petition ought to contain a more accurate description of the property sought to be taken, saying: "Shade trees might be trimmed to make way for wires in such a manner that the damage would be very slight; on the other hand, they might be so mutilated that the damage would be very great. By showing the location of the poles with the position of the crossarms, which it is proposed to place thereon, it may be ascertained, with reasonable certainty, what the damage would be." He, therefore, sustained the defendants' objections to the petition and directed that the petition be amended in this and such other particulars as counsel for the petitioner might advise. There does not appear to be any specific provision in the Condemnation Law for thus questioning the sufficiency of a petition in condemnation proceedings by objection on the part of the property owner; but this method of procedure

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has been sanctioned by the courts for many years. (See *Metropolitan Elevated Railway Co. v. Dominick*, 55 Hun, 198.)

I think the description of the property sought to be condemned in this proceeding complies with the requirements of the statute in all respects save one; but that it is not sufficiently specific in stating the extent of the right which the petitioner desires to acquire "to trim such trees as may be necessary to protect said line from interference."

The command of the Condemnation Law is that the petition shall contain "A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty." In the view of the law the condemnation proceeding, when carried to a conclusion favorable to the plaintiff, operates as a purchase of the land or an interest therein for the sum fixed by the commissioners. (*Vandermulen v. Vandermulen*, 108 N. Y. 195, 201.) The stringent character of the power of eminent domain demands that the methods of procedure prescribed for its exercise shall be strictly if not inflexibly followed. (*Schneider v. City of Rochester*, 160 N. Y. 165.) The only property which can lawfully be taken is the precise property designated in the petition. (*People ex rel. Johnson v. President, etc., of the Village of Whitney's Point*, 102 N. Y. 81.) The property or interest to be acquired must be ascertainable from the description thereof in the petition itself without reference to extrinsic facts. "Without this the owner of land cannot know what portion of his lands is required; nor the commissioners what damages to appraise; nor the petitioner the precise boundaries of the land after the same is acquired." (*Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 191.) Extreme accuracy should be exacted in proceedings of this character in order to safeguard the rights of all concerned. "There must be no uncertainty in the description of the property to be taken nor in the degree of interest to be acquired." (*Matter of Water Commissioners of Amsterdam*, 96 N. Y. 351.)

It seems to me that these well-established rules of law

would be disregarded if it were to be held in a condemnation proceeding to acquire property for the construction of a telephone line, that it was sufficient to describe the proposed interference with growing trees upon the premises of the landowner merely as "the right to trim such trees *as may be necessary* to protect said line from interference." Such a statement conveys no idea of the extent of the contemplated invasion. In the present proceeding, while the location of the poles and the situation of the crossbars thereon would give the property owner all needful information as to the proximity of the poles to the trees along the route, he would be left wholly in the dark as to the distance which the telephone company proposed to maintain between the wires and any portion of such trees as "necessary to protect said line from interference." He might suppose, for example, that if a tree was so trimmed that no branches should approach within a foot of the line, the safety of the line would be maintained, whereas, on the other hand, the officers of the telephone company might insist that it was essential to safety to trim away a tree so that no part of it should be nearer than five feet or ten feet from the line. The precise distance which the condemning party deems necessary to maintain the safety of the line must be actually known to the officers or engineers of this telephone corporation. That distance will have to be disclosed to the commissioners in order to enable them justly and fairly to assess the damage sustained by the property owner; and it should be stated in the petition in order that the property owner may be informed in advance as to the extent of the interest which the condemning party seeks to acquire, and in order that the commissioners may be similarly guided in measuring their award. It is not enough in a proceeding to condemn an interest in land for public purposes to describe the interest sought to be acquired so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the quantum of the interest which it may be deemed necessary to take. This view is sustained by the decision of this court in

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People ex rel. Eckerson v. Trustees of Vil. of Haverstraw (137 N. Y. 88), which was a proceeding to lay out a street in the village of Haverstraw, instituted upon a petition which asked that a street be laid out over the lands of certain persons named therein, "and upon lands included and forming part of Rockland Street or so much thereof as may be necessary" to form a connection between the north end of Rockland street and another designated street. The jury which assessed the damages determined that ninety feet of land were necessary to make the prescribed connection and based their award upon that determination. It was held that they had no power to do this, being limited to the exercise of but one function, which was to ascertain the damages sustained by the landowners whose lands should be taken; and the entire proceeding was set aside, notwithstanding the fact that counsel for the village trustees in the course of the hearing before the jury limited the claim of the village to a strip of land only ninety feet in length. The case is similar in principle to *Hayden v. State of N. Y.* (132 N. Y. 533), which involved a question whether the state under a resolution of the canal board had acquired all of the water of Owasco creek. The resolution declared that the map for the permanent appropriation of the Port Byron water power on the Owasco outlet for the feeder to the Erie canal submitted by the state engineer and surveyor "is hereby approved, and the water and lands necessary for said feeder are hereby permanently appropriated." The court held that inasmuch as the resolution did not state that *all* of the water of the outlet or that any particular quantity or part of it was appropriated, the description was too indefinite to effect a legal appropriation. "To make a legal and permanent appropriation of land or water for the use of a canal," said Chief Judge FOLLETT, "the quantity must be definitely ascertained and described, so that the owner may know how much he has lost and what he is entitled to be compensated for." So in the case at bar, to legally condemn any portion of the defendants' trees in the vicinage of the plaintiff's telephone line the degree of proximity requisite to

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authorize the removal of any part of such trees must be definitely ascertained and described in the petition before the plaintiff should be allowed to go on with its condemnation proceedings.

This rule is so obviously consonant with the requirements of fairness and justice that we should not hesitate to adopt it unless otherwise constrained by controlling authority. I find no such authority in the cases cited in behalf of the respondent. No question as to the sufficiency of the description of the property sought to be taken was involved in *Rochester Ry. Co. v. Robinson* (133 N. Y. 242). The case of *Satterly v. Winne* (101 N. Y. 218) was a statutory proceeding to lay out a private road, where it was held that exact and technical accuracy was not required, but merely a substantial compliance with the statute, and that a description was sufficiently definite which referred to a private way used by permission of the owner of the land for so great a number of years that it had come to be called a road. In *Brooklyn Elev. R. R. Co. v. Nagel* (75 Hun, 590; affirmed without opinion in 150 N. Y. 562) Mr. Justice CULLEN did express the opinion that a description in the petition of the easements sought to be acquired was sufficient, assuming that they were described as easements "which now are or may be the subject of injury from a construction of said railway or incidental to its use." In the language thus quoted, however, I do not understand the words "may be" to mean "may hereafter become;" but in any event an examination of the record on appeal in that case shows that the phraseology of the petition must have been inadvertently misquoted, and that the easements therein described as those which the petitioner sought to acquire were thus stated: "The easements of light, air, access and any other right, title or interest whatsoever as abutting owners or otherwise *which may now be* the subject of injury or inconvenience resulting from the structure of the said railroad or incidental to its use." (Court of Appeals Cases, vol. 46.) This extract from the petition shows that the easements, the acquisition of which was sought by

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the petitioning corporation, were merely those which had already actually been invaded by its existing elevated structure.

The order of the Appellate Division appealed from should be reversed and that of the Special Term affirmed, with costs in both courts, and both questions certified should be answered in the negative.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Order reversed, etc.

THE WASHINGTON TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Respondent, v. MORSE IRON WORKS AND DRY DOCK COMPANY et al., Defendants.

PRINDLE ENGINEERING COMPANY, Respondent, and DANIEL F. COONEY et al., Appellants.

1. TRUST MORTGAGE — JUDGMENT DIRECTING FORECLOSURE SALE OF PROPERTY, THE TITLE TO WHICH REMAINED IN VENDOR. In an action to foreclose a trust mortgage given to secure the bonded indebtedness of a corporation, it appeared that after the execution of the mortgage the corporation had purchased a pumping plant under a contract providing that the title thereto should remain in the vendor until final payment; that more than half of the purchase price had been paid; that the vendor upon application had been permitted to intervene in the action, and requested that the pumping plant be excepted from the foreclosure sale or the balance due be first paid from the proceeds thereof. *Held*, that a judgment directing that it should be first paid from the proceeds of the sale could not be justly complained of by the general creditors.

2. WHEN VENDOR CANNOT INSIST UPON SALE OF MORTGAGED PROPERTY FOR ITS SOLE BENEFIT. Where, during the pendency of the foreclosure action, bankruptcy proceedings had been instituted, and subsequent to the judgment, but before a sale pursuant thereto, the trustee in bankruptcy sold the interest of the mortgagor to a new corporation formed to take over the property of the bankrupt which paid off the mortgage indebtedness and obtained a discharge of the mortgage, but failed to pay the balance due the vendor, and thereafter procured a stay of the sale of the premises under the foreclosure decree, the vendor not having under its contract any lien upon or interest in the mortgaged premises, and not having obtained through its intervention

any lien or interest that it did not theretofore possess, has no right to insist upon a sale independently and solely for its benefit of the mortgaged property. It has, however, the right to remove or sell the pumping plant in case of default in payment of the balance due thereon.

Washington Trust Co. v. Morse I. W. & D. D. Co., 106 App. Div. 195, modified; 114 App. Div. 886, reversed.

(Argued January 11, 1907; decided January 29, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 12, 1905, which affirmed a judgment of Special Term decreeing the foreclosure of a mortgage and a sale of the mortgaged premises.

Also appeal, by permission, from an order of said Appellate Division, entered July 24, 1906, which reversed an order of Special Term in so far as it stayed a sale under the judgment of foreclosure.

The following question was certified:

"Whether, on the facts shown by the record herein and upon the opinion of the Appellate Division herein affirming in part and denying in part an order made by Mr. Justice SAMUEL T. MADDOX and entered in the office of the Clerk of Kings County on the 26th day of October, 1905, the defendant Prindle Engineering Company has the right to have the mortgaged premises sold, pursuant to the judgment entered herein for the payment of its claim, although the mortgage to foreclose which this action was brought has, since the entry of said judgment been paid, satisfied and discharged of record by the plaintiff without the consent of the Prindle Engineering Company?"

The facts, so far as material, are stated in the opinion.

David McClure for appellants. The lien of the mortgage did not extend to the property of the Prindle Company. (*Kerley v. Clapp*, 15 App. Div. 37; *Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, 1 N. Y. 564; *Goddard v. Gould*, 14 Barb. 662; *Tift v. Horton*, 53 N. Y. 377; *Sayles v. N. W. P. Co.*, 41 N. Y. S. R. 856; *F. Ins. & S. D. Co. v. R. I. Co.*, 81 Fed. Rep. 439.) The Prindle Company acquired

no lien by reason of its agreement with the Morse Company or otherwise. (*Arnold v. Delano*, 4 Cush. 38; *Lickbarron v. Mason*, 6 East, 21; *Husted v. Ingraham*, 75 N. Y. 251; *Harring v. Hoppock*, 15 N. Y. 409; *Ballard v. Burgett*, 40 N. Y. 314; *Payne v. Wilson*, 74 N. Y. 348; *McCaffrey v. Woodin*, 65 N. Y. 459; *Hale v. Omaha Bank*, 49 N. Y. 626; *Coats v. Donnell*, 94 N. Y. 168; *Reynolds v. Ellis*, 103 N. Y. 115; *Hovey v. Elliott*, 118 N. Y. 124.) The equitable power of the court should have been exercised only to the extent of excepting the Prindle Company's property from the foreclosure sale. (*Scheppelmann v. Feurth*, 87 Mo. 351; *Jones on Mort.* § 1929; *Adee v. Bigler*, 81 N. Y. 349; *Estes v. Wilcox*, 67 N. Y. 264; *O. Nut. Bank v. Olcott*, 46 N. Y. 12; *N. Y. D. & P. Co. v. De Westerberg*, 46 Hun, 281; *Akin v. Kellogg*, 119 N. Y. 447.) Whether the appeal from the judgment of foreclosure be sustained or not, the Prindle Company is without the right to have the mortgaged premises sold for its sole benefit. (*Corning v. Smith*, 6 N. Y. 82; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Barker v. Burton*, 67 Barb. 458; *Lee v. Parker*, 43 Barb. 611.)

George M. Clark and Henry Galbraith Ward for Prindle Engineering Company, respondent. The order of the Appellate Division affirming the judgment of the Special Term was right. (*Friedman v. Phillips*, 84 App. Div. 179; *Jacobie v. Mickle*, 144 N. Y. 237; *Older v. Russell*, 8 App. Div. 518; *Cromwell v. MacLean*, 123 N. Y. 474; *M. T. Co. v. T., etc., R. R. Co.*, 18 Abb. [N. C.] 368.) The Prindle Engineering Company had a right to be paid the sum awarded in the judgment in the foreclosure action by the sale of the mortgaged premises under said judgment. (*W. T. Co. v. M. I. W. & D. D. Co.*, 114 App. Div. 886.)

HAIGHT, J. The defendant, the Morse Iron Works and Dry Dock Company, hereinafter called the Morse Iron Works Company, executed and delivered a mortgage on all of its

property and appurtenances then possessed and to be thereafter acquired to the plaintiff, as trustee, to secure the payment of its bonds, amounting in the aggregate to \$450,000. The mortgage covered a certain piece of real estate therein described, with water rights and dry dock connected therewith. Subsequently the Morse Iron Works Company entered into a contract with the Prindle Engineering Company, hereinafter called the Prindle Company, under which that company constructed a flooding and pumping plant in the Morse Iron Works Company's dry dock, for which the Prindle Company was to be paid the sum of \$60,000, at times specified, but containing a provision to the effect that the title of the flooding and pumping plant was to remain in the Prindle Company until final payment. Payments were made upon this contract from time to time amounting to the sum of \$33,847.86, leaving due thereon the sum of \$26,162.14. In February, 1903, the Morse Iron Works Company and the Prindle Company entered into a supplemental agreement in writing, whereby the Morse Iron Works Company gave to the Prindle Company three promissory notes, each for \$8,717.38, payable respectively in November, 1903, February, 1904, and August, 1904, but the giving and acceptance of these notes was not to be regarded as payment, and if default was made in the payment of any one of the notes the whole outstanding balance should immediately become due and payable, and until the payment of all of the three notes the title to the flooding and pumping plant should remain in the Prindle Company as provided in the original agreement. Subsequently, default was made by the Morse Iron Works Company in the payment of the principal and interest upon its bonds and also in the payment of the notes that it had given to the Prindle Company. Thereupon the plaintiff, as trustee under the mortgage, commenced this action for the foreclosure of the same, not making the Prindle Company a party to the action, but subsequently, upon the application of the Prindle Company, it was permitted to intervene and serve an answer setting up the contract under which it had con-

structed the flooding and pumping plant and asking that it be adjudged to be the owner of the plant free and clear of the mortgage and that it be excepted from any sale that should be decreed of the premises and property of the Morse Iron Works Company; or in the alternative that the Prindle Company be first paid the amount owing to it out of the proceeds of the sale. There was an issue raised as to the amount that remained unpaid upon the Prindle Company's contract and other issues with reference to the bonded indebtedness, which were disposed of upon the trial, which resulted in a judgment of foreclosure and sale to pay the bonded indebtedness in which the sale was directed to include the plant of the Prindle Company, and that that company, after the payment of costs, should be first paid the amount due and owing to it as represented by the promissory notes heretofore referred to. In the meantime proceedings in bankruptcy had been instituted, and pending an appeal from the judgment entered in the foreclosure action the defendant Petze, as trustee in bankruptcy, sold all of the interest of the Morse Iron Works Company in the mortgaged property to one John P. Cadigan, who, shortly thereafter, assigned the property so purchased by him to the Morse Dry Dock and Repair Company, a new corporation organized to take over the property of the bankrupt, consisting chiefly of the creditors of the old corporation, who thereupon paid off the mortgaged indebtedness to the trustee and the mortgage was thereupon discharged as of record, but they did not pay the balance due upon the Prindle Company's contract. Subsequently, the judgment entered upon the foreclosure of the mortgage was affirmed in the Appellate Division and an appeal was then taken to this court. Thereafter a motion was made on behalf of the trustee in bankruptcy and the creditors who had taken over the property under the bankruptcy sale to vacate the judgment in the foreclosure action, or for an order bringing in the Morse Dry Dock Company, the new corporation, as a defendant in the action. The Special Term denied the motion to vacate the judgment and the motion to bring in the new corporation

as a party except for the purposes of the motion, but directed that the sale of the premisses under the foreclosure decree be stayed and forbidden. Thereupon the Prindle Company appealed to the Appellate Division, which court reversed the order of the Special Term in so far as it stayed the Prindle Company from proceeding with the sale of the premises for the purpose of paying the amount due to it under the terms of the judgment.

With reference to the appeal from the judgment there is but little open for review in this court. The issue raised as to the amount remaining unpaid upon the Prindle Company's contract was a question of fact determined by the trial court, and that question has been finally disposed of by the unanimous affirmance of the Appellate Division. It is conceded on behalf of the Prindle Company that upwards of \$33,000 had been paid upon their flooding and pumping contract, and, therefore, the Morse Iron Works Company had acquired an equity in the property to that extent, which passed to the mortgagee as after-acquired property. The Prindle Company, in its answer, had asked that its property should not be included in the sale, or, in case it should be, that it should first be paid out of the proceeds of such sale. It, therefore, devolved upon the trustee prosecuting the action to determine as to whether it would insist upon including the Prindle plant in the sale or have it omitted therefrom. It appears as a fact found in the case that the flooding and pumping plant was necessary for the operation of the dry dock, and it was, therefore, apparently determined that it would be for the best interests of the creditors to have the pumping plant sold in connection with the dry dock, for the reason that it could continue its operation as such and would probably bring a greater sum on account thereof. We, therefore, are of the opinion that the creditors have no valid complaint to make as to the form of the judgment, and that so far as they are concerned the appeal therefrom should be affirmed.

With reference to the appeal from the order, in which that of the Special Term has been in part reversed, we differ with

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the conclusion reached by the Appellate Division. The Prindle Company under their contract had no interest in or lien upon the mortgaged premises. It retained title to its own plant which it had constructed until it was paid for in full. The Prindle Company was not a necessary party to the foreclosure action, nor was it made a party by the action of the trustee. It was only through its own intervention that it was permitted to come into the litigation, but we are unable to see how by such intervention it was able to acquire any lien upon or interest in the mortgaged property that it did not theretofore possess. It held title to its own plant. It had the right to remove or sell it in case of default in payment of the balance due thereon; but it had no right nor did the court have any power to direct a sale, independently and solely for its benefit, of the other property upon which the trustee held a mortgage for the securing of the payment of the bonded indebtedness of the Morse Iron Works Company. It is true that the judgment entered directs that the Prindle Company be first paid the amount due it out of the proceeds of the sale, but our examination of the judgment fails to disclose any provision authorizing a sale solely for the purpose of paying such claim. The sale authorized by the judgment is for the payment of the bonded indebtedness secured by the mortgage, not that owing to the Prindle Company. True, when the trustee, through the judgment, sought to sell the property of the Prindle Company it had the right to be paid the balance, its due; but unless there was a sale of its property in connection with that which was being sold for the payment of the bonded indebtedness it had no cause for complaint so far as the trustee or the bondholders were concerned. We are, therefore, of the opinion that there could not be an independent sale made under this judgment for the benefit of the Prindle Company only, and that inasmuch as the bonded indebtedness has now been paid in full and the mortgage discharged there should be no sale made under the decree.

The Special Term was of the opinion that the judgment entered upon the foreclosure of the mortgage should not be

vacated for the reason that it determined certain questions of fact which, under the judgment, would become *res adjudicata*. We do not deem it necessary, or now advisable, to comment upon the effect that this judgment may have upon other litigations. We are, however, of the opinion that no sale should now be had for the purpose of paying the Prindle Company's claim, and in view of such determination it, doubtless, would be just to that company that the provision of the judgment in so far as it bars and forecloses the rights of all parties to the property ordered to be included in the sale should be modified so as not to apply to the property or plant of the Prindle Company. With that modification the judgment should be affirmed and the order of the Appellate Division reversing the order staying the sale of the property should be reversed and that of the Special Term affirmed, without costs of these appeals to either party, and the question certified answered to the effect that the Prindle Engineering Company has not the right to have the mortgaged premises now sold.

CULLEN, CH. J., EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment accordingly.

GEORGE N. SEGER, as Administrator of the Estate of LOUISA SCHAEFFLER, Deceased, Respondent, v. THE FARMERS' LOAN AND TRUST COMPANY, as Substituted Trustee under the Will of CAROLINE WILDBERGER, Deceased, Appellant, Impleaded with Another.

ASSIGNMENT OF INTEREST IN TRUST ESTATE — WHEN NOTICE THEREOF IS SUFFICIENT TO CHARGE TRUSTEE WITH KNOWLEDGE OF THE FACTS AND RENDER IT LIABLE FOR PAYMENT TO BENEFICIARY. Upon the trial of an action against a trust company to recover a legacy assigned to plaintiff's intestate, it appeared that the defendant had been appointed as a substituted trustee under a will creating a trust fund of which the assignor was one of the beneficiaries and had received notice of the assignment; that it requested its submission to its counsel in order that it might be determined whether it covered any fund in its possession; that no attention was paid

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to such request; that at the time it received the notice the defendant had in its possession a decree disclosing that the assignor was one of the beneficiaries of the trust fund, and the assignee was one of the executors and trustees of the will, who had renounced; that the assignor was one of the children of a deceased son of the testatrix; that her interest was assignable; that it was duly assigned as stated in the notice; that the assignment was drawn by such executor; that after its execution it remained in his possession when the defendant was appointed trustee and received notice thereof; that notwithstanding these facts, upon the termination of the trust, it procured a judicial settlement of its accounts without notice to plaintiff, and thereupon paid the several beneficiaries their respective legacies, including the assignor's. *Held*, that although some of the facts were not known to the defendant at the time of the judicial settlement, enough were known to put it on inquiry which, if prosecuted diligently, would have disclosed all the facts, and that in making the payment to the assignor it acted at its peril and plaintiff was entitled to recover.

Seeger v. Schaeffler, 112 App. Div. 911, affirmed.

(Argued January 18, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 9, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

James F. Horan for appellant. The facts found by the court below do not make the "F. Schaeffler" letter sufficient to charge the trust company with notice of the assignment. They do not sustain the conclusions of law of the court below, and do not take the case out of the scope of this court's former decision. (*Heerman v. Ellsworth*, 64 N. Y. 159; *Stoddard v. Gailor*, 90 N. Y. 575; *Foster v. Cockerell*, 3 Cl. & F. 476; *Dearle v. Hull*, 3 Russ. 1; *Matter of Barr's Trust*, 4 K. & J. 219; *Wood v. Partridge*, 11 Mass. 488; *Foster v. Sinkler*, 4 Mass. 450; *Mars v. Bank*, 64 Hun, 424; *Schell v. Lowe*, 26 N. Y. Supp. 991; *Lloyd v. Banks*, L. R. [4 Eq. Cas.] 222; L. R. [3 Ch. App.] 488; *Dale v. Kimpton*, 46 Vroom, 76; *Barrow v. Porter*, 44 Vroom, 587; *Peck v. Walton*, 25 Vroom, 33.) The failure to respond to the trust company's

letter of May 29, 1893, and to its reasonable request for further information, deprives plaintiff of all right to recover. The plaintiff has been guilty of laches. (*Savings Bank v. Creswell*, 100 U. S. 630; *People's Bank v. National Bank*, 101 U. S. 181.)

John C. Gulick for respondent. The letter received by the trust company was sufficient notice of the assignment of the Barry interest. (*McAllister v. N. F. Ins. Co.*, 156 N. Y. 80.) The exhibition to the trust company of the assignment was not a prerequisite to the validity of the notice. (*Davenport v. Woodbridge*, 8 Greenl. 17; *Ellis v. Horrman*, 90 N. Y. 466; *Phillips v. Bank of Lewiston*, 18 Penn. St. 394.)

WERNER, J. This action was brought to recover a legacy in favor of one Louisa Barry, under the will of Caroline Wildberger, deceased, which was assigned by the legatee to the plaintiff's intestate. The defendant is the substituted trustee under said will. The action has been tried three times. At the first trial there was judgment for the plaintiff, which was affirmed in the Appellate Division with two dissenting opinions. (73 App. Div. 293.) On appeal to this court the judgments below were reversed and a new trial ordered on the dissenting opinions referred to. (176 N. Y. 589.) At the second trial judgment was given for the defendant, which was reversed at the Appellate Division and a new trial ordered. (103 App. Div. 39.) A third trial was then had, which resulted in a judgment for the plaintiff, from which there was an appeal to the Appellate Division, where it was unanimously affirmed without opinion (112 App. Div. 911), and the defendant now appeals to this court.

As the affirmance of the judgment now appealed from was unanimous, this court is bound by the conclusive presumption that every fact found by the trial court is supported by evidence, and the only question raised by the appellant that we have any right to consider is whether the conclusions of law

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are justified by the findings of fact. An examination of the decision framed at Special Term discloses that the conclusions of law under which the defendant has been held liable are amply sustained by the findings of fact. This is really all that it is necessary to say in the disposition of the present appeal, but since there have been several trials and appeals, with conflicting results, we will briefly refer to the changes which differentiate the appeal at bar from the one that was before us in 176 N. Y. 589, and this will necessitate a reference to some of the facts which make up the history of the case.

Caroline Wildberger died leaving a last will and testament, which was admitted to probate by the surrogate of the city and county of New York on November 13th, 1890. By the terms of this will a trust was created as to a portion of her estate for the benefit of the children of her deceased son, which was to continue during the minority of the youngest of such children. The instrument nominated Henry Bauer and Frank Schaeffler as executors and trustees, who qualified and performed their duties until July 30th, 1892, at which time their executors' accounts were judicially settled, and they renounced as trustees. On the 15th of May, 1893, the defendant was appointed substitute trustee to execute the trust above referred to. One of the children of the deceased son of the testatrix, who was benefited by this trust, was Louisa Barry. In October, 1892, she made a written assignment to the plaintiff's intestate of all her right, title and interest in and to the trust estate. In May, 1893, after the defendant had been made trustee, it received a notice signed by F. Schaeffler setting forth the above-mentioned assignment. This notice was acknowledged by the defendant company with the request that the assignment be sent for submission to its counsel, in order that it might be determined whether the instrument covered any fund in the trustee's possession. The sender of the notice made no reply to this request. Thereafter, and on May 15th, 1894, the assignee of the legacy referred to died intestate, and letters of administration upon her estate were issued to

the plaintiff on June 23rd, 1894. Thus matters stood until March, 1898, when the trust in question had terminated and the defendant, without notice to the plaintiff, procured a judicial settlement of its accounts as trustee, and paid over to the several beneficiaries their respective shares, including Louisa Barry, the assignor of the plaintiff's intestate. The facts respecting the judicial settlement and the payment to Louisa Barry did not come to the knowledge of the plaintiff until 1899.

Upon the facts thus outlined, the court at Special Term decided that the notice given by F. Schaeffler to the trustee in 1893 was sufficient to impose upon the latter the duty of further inquiry, and that its failure in this regard rendered it liable to the plaintiff, notwithstanding its payment of the legacy in good faith to Louisa Barry. When the case reached the Appellate Division it was affirmed as stated, but the dissenting judges thought that as the notice to the trustee of the assignment from Louisa Barry to the plaintiff's intestate came from a person who appeared to be an utter stranger to the record, it was not sufficient to charge the defendant with making any further inquiry, and that the failure of the sender of the notice to submit the assignment for inspection might well have been regarded as an abandonment of all claims under the assignment. These were the conclusions, fortified by the condition of the record, which influenced this court upon the former appeal to reverse the judgments of the courts below and to direct a new trial.

Upon the second and third trials the plaintiff presented an entirely different record. It now appears that when the notice of May 22nd, 1893, signed by F. Schaeffler, was received by the defendant, the latter had in its possession a certified copy of the decree referred to in the notice, which decree disclosed that Louisa Barry was one of the beneficiaries of the trust fund in the hands of the defendant, and that Frank Schaeffler was one of the executors and trustees of the will of Caroline Wildberger, deceased. It further appears that Louisa Barry was one of the children of Frederick Schlaefer,

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a deceased son of the testatrix; that her interest was assignable; that it was duly assigned to the plaintiff's intestate, as stated in the notice to the defendant; that the assignment was drawn by the executor Frank Schaeffler; and that after its execution it remained and was in his possession when the defendant was appointed substituted trustee and received notice of the assignment. It is true that some of these latter facts were not known to the defendant when its accounts were judicially settled, but it had knowledge enough to place it upon inquiry, and this, if diligently prosecuted, would have disclosed all that has been stated. The information suggested by what the defendant actually knew was easily obtainable from sources not difficult to reach, and must be deemed to have been in the possession of the defendant, upon the principle that he who is bound to inquire before the performance of an act by which he has reason to believe that the rights of others may be affected, is chargeable with a knowledge of all the facts that an inquiry properly made would have disclosed to him.

The judgment should be affirmed, with costs.

EDWARD T. BARTLETT, VANN and CHASE, JJ., concur;
CULLEN, Ch. J., GRAY and HISCOCK, JJ., dissent.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
EDWARD T. JOHNSTON, Appellant.

APPEAL — JUDGMENT OF APPELLATE DIVISION RENDERED IN CRIMINAL ACTION ORIGINATING IN COURT OF SPECIAL SESSIONS NOT REVIEWABLE. The Court of Appeals has no jurisdiction to hear an appeal from a judgment rendered by the Appellate Division affirming a judgment of a County Court modifying and affirming a judgment of a Court of Special Sessions convicting the defendant of the crime of petit larceny. (Code Crim. Pro. §§ 699-772.)

People v. Johnston, 112 App. Div. 812, appeal dismissed.

(Submitted January 14, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 15, 1906, affirming a judgment of the Warren County Court which modified and affirmed as modified a judgment of the Court of Special Sessions in the village of Glens Falls convicting the defendant of the crime of petit larceny.

The facts, so far as material, are stated in the opinion.

A. Armstrong and *L. Armstrong* for appellant.

William I. Kiley, District Attorney (*Daniel J. Finn* of counsel), for respondent.

VANN, J. On March 3rd, 1905, the defendant was convicted of the crime of petit larceny by a Court of Special Sessions held in the village of Glens Falls and sentenced to the Albany Penitentiary for the term of sixty-one days. An appeal was allowed to the County Court of Warren county, which modified the judgment by reducing the sentence to a fine of \$50, and as thus modified the judgment of the Court of Special Sessions was affirmed. A further appeal was taken by the defendant to the Appellate Division, which affirmed the judgment of the County Court. The defendant then served a notice of appeal to this court and the case when reached on the calendar was submitted without argument.

As a general rule, with one limitation not now important, we have no jurisdiction to hear an appeal from a judgment rendered by the Appellate Division in a criminal action which originated in a Court of Special Sessions. (*People ex rel. Comrs. of Charities v. Cullen*, 151 N. Y. 54, 59.) The apparent inconsistency between the case cited and a case with the same title reported in 153 N. Y. 629, is explained by a statute passed after our earlier decision was made and limited in its effect to the city and county of New York. (L. 1895, ch. 601, § 20.)

There is no right of appeal in criminal actions except as conferred by statute and we find none allowing an appeal to this court under the facts of this case. (*People v. Trezza*,

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128 N. Y. 529.) The subject is regulated by the Code of Criminal Procedure, of which part five is devoted to "proceedings in courts of special sessions and police courts." (§§ 699-773.) Title three of part five, relating to "appeals from courts of special sessions," authorizes an appeal to the County Court from judgments of conviction rendered by minor courts, including courts of special sessions and police courts. (§ 749.) The County Court may affirm or reverse the judgment so appealed from, "or may order a new trial, or may modify the sentence." (§ 764.) "If the judgment on the appeal be against the defendant he may appeal therefrom to the Appellate Division of the Supreme Court in the same manner as from a judgment in an action prosecuted by indictment." (§ 770.) "The judgment of the Appellate Division of the Supreme Court upon the appeal is final," with a single exception not now material. (§ 771.) As we said in *People ex rel. Comrs. of Charities v. Cullen* (151 N. Y. 54, 59): "The rule is absolute in all cases, with a single exception, and the proceeding before us is not covered by the exception. The legislature evidently intended to place a limit upon the right of review in the less important class of cases, by allowing only two appeals, one to the County Court and the other to the Supreme Court."

Part four of the Code of Criminal Procedure, embracing sections 133 to 699, relates to "proceedings in criminal actions prosecuted by indictment," and has no bearing upon actions prosecuted without an indictment, such as the one before us.

The provisions of the Code of Civil Procedure regulating our jurisdiction are confined to "civil actions and proceedings." (§§ 190, 191.)

The Constitution provides that "the Appellate Division in any department may * * * allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals." (Art. 6, § 9.) Assuming that this provision applies to criminal actions, still there was no attempt to comply with it, so far as the record discloses.

The defendant's appeal to this court was taken without the

authority of law, and we cannot consider the questions presented by his counsel. The appeal should be dismissed and the record remitted to the County Court of Warren county for appropriate action to enforce the judgment.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
ELLIOTT O. WORDEN, Respondent.

1. FOREST, FISH AND GAME LAW—PROHIBITION AGAINST FISHING IN CERTAIN WATERS—PROVISION OF SECTION 156 AS TO FILING OF REGULATION MANDATORY. That provision of section 156 of the Forest, Fish and Game Law (L. 1900, ch. 20; L. 1901, chs. 94, 662) requiring a copy of a regulation prohibiting fishing in certain waters to be "filed in the office of the clerk of the town to which the prohibition or regulation applies," is mandatory, rather than directory, not simply on account of the form of the command, but also because the object is to furnish an official record near at hand for convenient examination by those who wish to know whether fishing in a given stream has been prohibited by a local regulation; and the requirement must be strictly complied with.

2. INSUFFICIENT DESCRIPTION OF CREEK AFFECTED. Where the commissioner, upon the request of a town board, ordered that the waters of a specified creek and its tributaries should be closed for a prescribed period, but no copy of the order or minutes of the commission was filed in the office of the clerk of the town, a paper attached to the petition, prohibiting all persons from fishing "in this stream within this town" and filed with the clerk, is of no effect as a record in a public office, not only because it was not a copy of the regulation made, but because it fails to identify or describe, by name or otherwise, any stream to which a prohibitive regulation could apply; and although copies of the paper were posted along the creek specified, in the manner required by statute, the failure to file the requisite regulation is a good defense to an action to recover the prescribed penalties.

People v. Worden, 113 App. Div. 899, affirmed.

(Argued January 16, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 18, 1906, affirming a judgment in favor of defendant entered

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upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

The complaint sets forth a cause of action to recover from the defendant the sum of seventy-five dollars as a penalty for violating section 156 of the Forest, Fish and Game Law by fishing in Golley brook, a tributary of Canada creek, in the town of Lee, county of Oneida. The answer is a general denial. At the trial, after both parties had rested, the court granted a nonsuit, the Appellate Division subsequently affirmed and the plaintiff now appeals to this court.

The facts, so far as material, are stated in the opinion.

Howard C. Wiggins for appellant.

Elliott O. Worden, respondent, in person. (The statute was not complied with by the commission. (L. 1901, ch. 662, § 156.)

VANN, J. Golley brook is a small trout stream which rises in the town of Lee and empties into Canada creek in the county of Oneida. About two miles long, it varies in width from one foot to ten and in depth from six inches to twenty. Having a gravel bed and spring water which runs the year round, it has always been inhabited by brook trout. In the month of December, 1903, and at various times during the past eighteen years, brook trout were put in this stream at the expense of the state, and once with the apparent approval of the owner of the premises through which it runs and on which the defendant is alleged to have caught brook trout on the 10th of July, 1905.

The eighth article of the Forest, Fish and Game Law relates to the powers and duties of the forest, fish and game commission, which since March 12th, 1901, have been discharged by a single commissioner. (L. 1900, ch. 20; L. 1901, ch. 94.) Section 156 is a part of that article and, as amended by chapter 662 of the Laws of 1901, is as follows: "Close season established in towns. The commission, may on request of a majority of the town board of any town in which fish

have been or shall be placed at the expense of the state, prohibit or regulate the taking of fish from public inland waters therein, for not exceeding five years from the first of May next after such fish have been furnished. At least thirty days before such prohibition or regulation shall take effect, a copy of the same shall be filed in the office of the clerk of the town to which the prohibition or regulation applies, and printed copies thereof at least one foot square shall be posted along the shores of the waters affected, not more than fifty rods apart. Whoever shall violate or attempt to violate any such prohibition or regulation is guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of sixty dollars for each violation and an additional penalty of five dollars for each fish, taken or possessed in violation of this section."

In September, 1903, a majority of the town board of the town of Lee presented a petition, duly signed by them, to the forest, fish and game commission requesting it "to close Canada creek and tributary streams in the town of Lee for a period of three years," pursuant to "the provisions of said section 156 of the Forest, Fish and Game Law." On the 5th of November, 1903, the commission acted upon this petition by ordering that Canada creek and its tributaries in the town of Lee should be closed for a period of three years. No copy of the order or of the minutes of the commission appear to have been filed in the office of the clerk of said town, but on the 5th of December, 1903, the following paper attached to the petition of the town board was filed with said clerk: "Fishing Prohibited. Notice is hereby given that on the request of a majority of the town board of the town of Lee, Oneida County, N. Y., as provided in section 156, Chapter 20, Laws of 1900, as amended by chapter 662, Laws of 1901, known as the Forest, Fish and Game Law, all persons are prohibited from fishing in this stream within this town for the period of three years on and after March 1st, 1904. Signed, D. G. Middleton, Forest, Fish and Game Commissioner. Dated, Albany, N. Y., December 3, 1903."

Printed copies of this paper were posted along the shores of Golley brook in the manner required by the statute. No other action appears to have been taken and no other paper filed or notice given than is above set forth.

The question is raised by the defendant whether the proceedings to establish a close season for three years as to the waters of Canada creek and its tributaries in the town of Lee were regular and in accordance with law.

After fish have been placed in a stream at the expense of the state, the first action required is the request by a majority of the town board, and no claim is made that the procedure of the members of that body in this case failed in any respect to conform to the statute. This gave the commission jurisdiction to act by making the regulation asked for in the petition. The action of the commission in making the regulation or order of prohibition is not seriously questioned, although the date when the order was to go into effect is not named. It is, however, insisted that no copy of the regulation was filed with the town clerk as required by law and that the paper that was filed, even if regular in other respects, is so indefinite as to be void.

The regulation authorized by section 156 is in the nature of a local statute, and when the requirements are carefully observed the effect is to make fishing in the waters designated unlawful during the period named, the same as if the regulation had been made by the legislature itself. A copy of the regulation, however, as the statute expressly provides, "shall be filed in the office of the clerk of the town to which the prohibition or regulation applies." This we regard as mandatory rather than directory, not simply on account of the form of the command, but also because the object is to furnish an official record near at hand for convenient examination by those who wish to know whether fishing in a given stream has been prohibited by a local regulation. An examination of the statutes of the state would not give this information and the printed notices on the stream might in fact be unauthorized. Citizens are not compelled to travel many miles from home for

the purpose of examining the records of the forest, fish and game commission in order to see whether a regulation has been made, the violation of which subjects the offender to punishment for a crime and also to a penalty by civil action. They have the right under the statute to consult an official record near the waters affected, and, hence, the requirement that a copy of the regulation must be filed with the town clerk should be strictly complied with.

No copy of the order as made by the commission was filed. The form of the regulation as shown by the minutes kept by the clerk was as follows: "On the petition of the town board of the town of Lee, Canada creek and its tributaries in the town of Lee were closed for a period of three years." Orderly procedure would suggest that a certified copy of this brief minute should be filed in the office of the town clerk, but no copy, not even one uncertified, was in fact filed. The paper actually filed is not a copy of the regulation as made, for it differs not only in form but in a very material and substantial requirement. The regulation designated Canada creek and its tributaries in the town of Lee as the prohibited waters, while the paper filed with the town clerk designated no particular stream, but simply mentioned "this stream." While these words are clear enough in their meaning when they appear in a notice posted on the bank of a stream, they are wholly without meaning when they appear in a paper filed in the town clerk's office as part of a regulation having the force of a statute. The prudent citizen, wishing to fish but anxious to obey the law, would search that office in vain to learn what stream was meant. He could not find the record required by the statute in order to close Golley brook, and the paper which he might have found, even if sufficient in other respects, did not point to Golley brook as a closed stream. That paper was of no effect as a record in a public office, not only because it was not a copy of the regulation made, but also because it failed to identify or describe, by name or otherwise, any stream to which a prohibitive regulation could apply. The words "this stream," with nothing to tell what

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stream was meant, would be void for indefiniteness if they occurred in an act passed by the legislature, and they are none the less void in a regulation, which, when the law is observed, is practically a statute.

This conclusion makes it unnecessary to pass upon the meaning of the words "public inland waters" as originally used in section 156 of the Forest, Fish and Game Law. The doubt as to what waters were meant has been removed as to the future by the action of the legislature, which recently so amended the section as to omit the word "public" and to thus describe the waters intended as "inland waters" simply. (L. 1906, ch. 241; L. 1906, ch. 409.)

We think that the motion to nonsuit was properly granted, and that the judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS C. QUINN, Appellant, v. JOHN R. VOORHIS et al., Composing the Board of Elections of the City of New York, Respondents.

ELECTION LAW — BOROUGH OF MANHATTAN — PUBLICATION OF LIST OF REGISTRATION AND POLLING PLACES IN PARTY NEWSPAPERS — TEST PRESCRIBED BY STATUTE IN THE SELECTION AND APPOINTMENT OF SUCH NEWSPAPERS. The Election Law (L. 1896, ch. 909, § 10, as amd. by L. 1906, ch. 259) which provides that, in the borough of Manhattan, the board of elections shall publish a list of the registration and polling places in such borough in four newspapers advocating the principles of the party polling the highest number of votes at the last preceding election for governor, and also in four other newspapers advocating the principles of the political party polling the next highest number of votes, prescribes no test, in the selection and appointment of newspapers to publish the list, except that they shall advocate the principles of such parties; the courts have no power, therefore, to grant a peremptory writ of mandamus requiring the board of elections to publish the list in four newspapers which support the candidates nominated, and the platform

adopted, at a certain convention held by one of the parties designated in the statute; and an order of the Appellate Division reversing an order of the Special Term granting such a writ, and directing that a mandamus issue requiring the board to publish the list in four newspapers which advocate the principles of such party is correct and should be affirmed.

People ex rel. Quinn v. Voorhis, 115 App. Div. 218, affirmed.

(Argued January 11, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 9, 1906, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to publish certain election notices in a designated class of newspapers published in the city of New York.

The facts, so far as material, are stated in the opinion.

Otto T. Hess and *Thomas W. Churchill* for appellant. The provisions of section 10 of the Election Law made it mandatory upon the board of elections to designate four newspapers published in the borough of Manhattan which advocated the success of the candidates of the Democratic convention at the ensuing election. (L. 1896, ch. 909; L. 1906, ch. 259.)

William B. Ellison, Corporation Counsel (*Arthur C. Butts*, *Terence Farley* and *Thomas F. Noonan* of counsel), for respondents. Section 10 of the Election Law imposed no duty upon the board of elections of the city of New York, except to publish the election notices provided for therein in newspapers which advocated the principles of the two great parties of this state. The provisions of the order appealed from legislate a new provision in section 10 of the Election Law, contrary to its plain terms and against its very spirit. (L. 1896, ch. 909; L. 1906, ch. 259.) The Appellate Division properly reversed the order of the Special Term, upon the ground that it was wrong to limit the board of elections in selecting newspapers to publish the election notices, under section 10 of the Election Law, to those newspapers advocating the election of the candidate of the Democratic party

for governor. (L. 1896, ch. 909; L. 1906, ch. 259.) The order of the court below commanding the board of elections to select as Democratic newspapers to publish election notices those advocating the election of William Randolph Hearst as the candidate of the Democratic party for governor was a plain and palpable restriction of the discretion of said board which it was beyond the power of the court to impose under section 10 of the Election Law. (*People ex rel. Harris v. Comrs, etc.*, 149 N. Y. 30.)

Per Curiam. The statute under consideration in this case required the defendants, amongst other things, to make publication of a list of the registration and polling places designated for the borough of Manhattan "in four daily newspapers published in the Borough of Manhattan which advocate(d) the principles of the political party polling the highest number of votes in the state at the last preceding election for governor, and also in four daily newspapers published in the Borough of Manhattan which advocate(d) the principles of the political party polling the next highest number of votes for governor at said election, one of which newspapers may be a daily newspaper published in the German language." (L. 1896, ch. 909, § 10, as amended by L. 1906, ch. 259.) Under this statute it became the duty of the defendants to designate what may be generally described as four Democratic newspapers, and they made a purported compliance with this requirement. The relator, claiming that the newspapers selected did not meet the test imposed, instituted mandamus proceedings to compel the defendants to designate the "Daily News" as one of the four Democratic papers. Upon the return of the application the Special Term made an order that a peremptory writ of mandamus forthwith issue, commanding the defendants to publish the notice in question "in four daily newspapers published in the Borough of Manhattan which advocate the election of William Randolph Hearst as the candidate of the Democratic party for Governor, the said Democratic party being a political party polling the next

highest number of votes for Governor at the last election in the State of New York, and its platform as set forth at the convention held in the city of Buffalo, State of New York, on the 26th day of September, 1906, at which said convention William Randolph Hearst of New York was nominated for Governor and the Democratic ticket as nominated at said convention."

Upon appeal to the Appellate Division that court reversed the order of the Special Term and directed that a mandamus issue requiring the defendants to publish the notices in question "in four daily newspapers published in the Borough of Manhattan which advocate the principles of the Democratic party."

We think and hold that the order of the Special Term was clearly erroneous and that the order of the Appellate Division was correct.

The first order required the defendants to measure the availability of a newspaper by the threefold test whether it was (1) supporting a certain candidate for governor, (2) supporting a platform adopted at a certain convention, and (3) supporting the ticket as nominated at said convention. No such test was prescribed by the statute, and the Appellate Division applied the proper rule in requiring the defendants, as a board of elections, to appoint papers which advocated the principles of the Democratic party. That was the test provided by the statute. Of course, if a controversy should arise over the fact whether defendants did satisfy this test and designate papers advocating the principles of a certain party it might be pertinent, as bearing upon and tending to the solution of the inquiry, to ascertain whether those papers did or did not support certain candidates and platforms. But that would be a matter of proof under the provisions of the statute. The rule laid down by those provisions relates to "principles."

Many other questions are argued upon this appeal and some of them seem to have been more or less considered and discussed in the court below. The answer which we have given to the particular proposition very briefly considered is sufficient to lead to an affirmance of the order appealed from, and we do not desire at this time to pass upon, or even consider, the

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other questions pressed upon our attention. It will be sufficient to consider them hereafter if they arise and are presented in any case or proceeding which necessarily involves a disposition of them.

The order should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

ALFRED WAHRMAN, an Infant, by ADOLPHUS RATHMILLER,
His Guardian ad Litem, Respondent, v. THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, Appellant.

NEGLIGENCE — NEW YORK (CITY OF) — LIABILITY OF BOARD OF EDUCATION FOR INJURIES CAUSED BY FALLING OF CEILING IN SCHOOLROOM. While the power to repair and keep in condition the public school buildings in the city of New York is not given by the charter to the board of education, so that the board is not liable under the doctrine of *respondet superior* for the negligence of those having in charge the care and repair of such buildings, the board is vested with the management and control of the public schools, including the sole power to close them, so that if there is any negligence with reference to such closing it must be that of the board; and where, in an action brought against the board by a pupil of a public school for injuries received from the falling of the ceiling while occupying a seat assigned to him in a schoolroom, there is evidence that the schoolhouse and ceiling were out of repair; that the ceiling had been examined from time to time by inspectors appointed by the board who had noticed that the ceiling was cracked and liable to fall and had reported such fact to the board, it is liable to the plaintiff for its negligence in allowing the school building to be occupied by pupils after it had knowledge of the unsafe condition of the building and ceiling.

Wahrman v. City of New York, 111 App Div. 345, affirmed.

(Argued January 23, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 14, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William B. Ellison, Corporation Counsel (James D. Bell of counsel), for appellant. No person or corporate body representing the state in carrying out its will in regard to the public school system can, in actions of tort, be held liable for anything beyond his or its personal acts of nonfeasance or misfeasance as the doctrine of *respondet superior* does not apply. (*Ham v. Mayor, etc.*, 70 N. Y. 459; *Donovan v. Bd. of Education*, 85 N. Y. 117; *Reynolds v. Bd. of Education*, 33 App. Div. 88; *Rhall v. Board of Education*, 40 App. Div. 112; *Maxmilian v. Mayor, etc.*, 62 N. Y. 160; *Turner v. Kowenhoven*, 100 N. Y. 115; *Tingue v. Vil. of Port Chester*, 101 N. Y. 294; *Cahill v. Hilton*, 106 N. Y. 512; *Wood v. Terry*, 4 Lans. 80; *Ensign v. McKinney*, 30 Hun, 249.) The doctrine as to nuisance does not apply to the case at bar, and if it did the defendant would not be liable. (*Lefrois v. County of Monroe*, 162 N. Y. 563.) On the facts there was no evidence to be submitted to the jury of the defendant's negligence, as there was no notice, expressed or implied, of a dangerous defect in the ceiling whose fall caused the injury to the plaintiff. (*Hamilton v. City of Buffalo*, 173 N. Y. 72; *Morgan v. Vil. of Penn Yan*, 42 App. Div. 582; *Matthews v. City of New York*, 78 App. Div. 422.)

Edmund F. Driggs for respondent. The complaint set up and the testimony proved a cause of action against the corporation individually for both negligently exposing plaintiff to harm and actively maintaining a nuisance to his injury. (*Gunnison v. Bd. of Education*, 176 N. Y. 11; *Bolton v. Vil. of New Rochelle*, 84 N. Y. 281; *Simmons v. Everson*, 124 N. Y. 319; *Morris v. Barrisford*, 9 Misc. Rep. 14.)

HAIGHT, J. This action was brought to recover damages for a personal injury. The plaintiff was a pupil, twelve years of age, attending Public School No. 100 in West Third street, Coney Island, in the city of New York. On the 27th day of May, 1904, while occupying a seat assigned to him in the schoolroom, the ceiling of the room broke and fell upon the top of his head fracturing his skull and causing the injury for

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which this action was brought. Upon the trial there was evidence given tending to show that the schoolhouse and the ceiling were out of repair; that it had been examined by inspectors appointed by the defendant from time to time, who had observed the condition of the building and that the ceiling was cracked and liable to fall, and that the result of such inspection had been reported to the defendant.

At the close of the plaintiff's case and again at the close of the evidence the defendant's counsel moved to dismiss the complaint upon the ground that the plaintiff had not shown at the time nor for several months before the accident, that there was any condition of the school building that constituted negligence of the board of education or of any of its subordinates or gave them any notice or idea that it was dangerous to have school there; that the board of education is not responsible for any of the acts of its subordinates and that the doctrine of *respondet superior* does not apply to defendant in this case and that there is no evidence to connect the board of education with any obligation to do anything to this building to put it in condition; and also that in no case of this kind is the board of education responsible for the tortious acts of any of its officers or agents. The motions were denied and exceptions were taken.

The case was submitted to the jury upon the charge that if the jury find "that the Board of Education was guilty of negligence in permitting the occupation of this room by the pupils of this school on the 27th day of May, 1904, by reason of the condition of the ceiling and what they knew or ought to have known as to its condition then the plaintiff is entitled to recover. The negligence which is the basis of the right to recover, if any, is the negligence in permitting it to be occupied for the purposes of a school room." No exception was taken to this charge. It, therefore, must be treated as the law of the case. It consequently follows that the only question presented for review arises under the defendant's motions for a dismissal of the complaint. It is quite true that the doctrine of *respondet superior* does not apply to

the board of education and that it is not responsible for any of the acts of its subordinates.

In the case of *Ham v. Mayor, etc. of N. Y.* (70 N. Y. 459), it was held that the department of public instruction in the city of New York, although formally constituting a part of the city government, is charged with the performance of duties relating and belonging to the administrative branch of the state government, and, consequently, that the city was not liable for the negligence or unskilfulness of its subordinates and servants in the discharge of their duties.

In *Donovan v. Board of Education of the City of New York* (85 N. Y. 117) it was held that while the board of education was vested with the general control and care of the school buildings and property for the purposes of public education, the care and safekeeping of such buildings were committed to ward trustees and that the board was not liable for their neglect of duty. And then again, in *Donovan v. McAlpin* (85 N. Y. 185), it was held that the ward trustee was not liable for the negligent acts of a servant in negligently leaving an excavation in the yard of a school building open, into which the plaintiff fell and was injured, and this, upon the ground that the trustee was a public officer discharging his duties as such and was not liable for the acts of servants employed by him and that the doctrine of *respondeat superior* had no application to the case.

In the case of *Bassett v. Fish* (75 N. Y. 303) the action was to recover damages for injuries sustained by a teacher in stepping through a hole in the floor of a schoolroom. The action was brought against the trustees, naming them, composing the board of "Gowanda Union Free School District No. One," which was a corporation. It was held that the trustees were not liable for their acts as such, for the reason that the making of them an incorporated body and giving them corporate powers rendered the liability corporate and gave personal exemption to the individual trustee. FOLGER, J., in delivering the opinion of the court, said where "the duty is put upon an incorporated body by the statute

creating it, instead of upon the individuals acting as public officers, to take reasonable care that premises are in a fit state for use, those injured by the neglect of that body may have an action against it and be indemnified out of the funds vested in it by the statute, or which it is empowered thereby to raise." It was, consequently, held that where the corporation was negligent it was liable and not the individual trustees, in so far as their negligence consisted of their acts as such trustees, but in case one or more of the trustees had individually undertaken to take charge of or keep a schoolroom in repair then he might become personally liable, not as trustee, but as a servant of the board. It, consequently, follows that while the board of education is liable for its own negligence the doctrine of *respondeat superior* does not apply to it and it is not liable for the negligent acts of any of its subordinate officers or servants.

It is now contended on behalf of the board of education that the duty of keeping the schoolroom in repair devolved upon other officers, such as the superintendent of school buildings and other subordinates, and that steps had already been taken by such officers for the repairing of this school building. Assuming, for the purposes of this case, that such duties devolved upon the subordinate officers, the board of education has not been held liable for the failure to make repairs. The only negligence charged against it, upon which it has been held liable, was in allowing the school building to be occupied by pupils.

Under the provisions of the charter the board is given the management and control of the public schools of the city. While the power to repair and keep in suitable condition is given to other officers, the power to close schools seems to be vested solely in the board and, consequently, if there is any negligence with reference to such closing it must be that of the board.

The judgment, therefore, should be affirmed, with costs.

CULLEN, CH. J., GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT, HISCOCK, JJ. (and CHASE, J., in result), concur.

Judgment affirmed.

HENRY MCKONE, Respondent, v. THE VILLAGE OF WARSAW,
Appellant.

NEGLIGENCE — HIGHWAYS — WHEN VILLAGE NOT LIABLE FOR INJURY TO A HORSE CAUSED BY HIS STEPPING UPON A LOOSE STONE IN HIGHWAY. While an incorporated village is bound to exercise such reasonable care and diligence in repairing the highways within its corporate limits, and in removing loose stones therefrom, as may be required by the location and the extent of the use of such highways, a village, having many miles of streets and highways within its limits, is not liable for an injury to a horse, as the result of stepping upon a loose stone, in a rarely used road running through an unsettled part of the village and over a steep hill, subjected not only to the washing of surface waters, but to the dragging upon it of the "rough-locked" wheels of descending vehicles, whereby the surface of the road was torn up and deep ruts formed, where there is no evidence that the village was maintaining a nuisance or had created by its positive act, or had permitted to continue, a place of danger in the highway from which the injury might have resulted. The village was not bound to use such care and skill as to render accidents impossible upon its ways or streets; the active vigilance, which is due from it with respect to their maintenance in a fairly safe condition, is a relative term, and to hold the village responsible for the occurrence of the accident in question would be to make of it an insurer against accidents as to all persons using the way.

McKone v. Village of Warsaw, 89 App. Div. 616, reversed.

(Argued January 30, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 9, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. E. Charles for appellant. A nonsuit should have been granted because the proof failed to show any actionable negligence on the part of the village, resulting in the injury complained of. (*Osterhout v. Bethlehem*, 55 App. Div. 198; *Masterton v. Vil. of Mt. Vernon*, 58 N. Y. 394; *Hubbell*

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v. *City of Yonkers*, 104 N. Y. 439; *Sutphen v. Town of North Hempstead*, 80 Hun, 409; *Lane v. Town of Hancock*, 142 N. Y. 521; *Hamilton v. City of Buffalo*, 173 N. Y. 72; *Woolsey v. Trustees of Ellenville*, 69 Hun, 488; *Day v. Town of New Lots*, 107 N. Y. 148; *Wright v. Delafield*, 25 N. Y. 266; *Glasier v. Town of Hebron*, 131 N. Y. 447.)

M. L. Coleman for respondent. The ruling of the trial justice in submitting to the jury the question of the defendant's negligence was justified by the evidence, and his refusal to grant a nonsuit was proper. (*Weed v. Vil. of Ballston Spa*, 76 N. Y. 329; *Roe v. Mayor, etc.*, 4 N. Y. Supp. 447; *Conroy v. S. R. R. Co.*, 52 How. Pr. 49; *Eggleston v. C. T. Road*, 25 Hun, 148.)

GRAY, J. The plaintiff has sued the village of Warsaw for the damage occasioned to him by an injury to his horse, as the result of stepping upon a loose stone in the street. The allegations in the complaint are, in brief, that the defendant had "wrongfully, carelessly and negligently omitted to remove rolling stones from the beaten track of Buffalo Road in the village" and that while, on June 28th, 1899, he was driving his team of horses upon the road, one of them "stepped upon the rolling stones, thereby causing his said horse to injure one of its legs and fall, * * * from which said horse received serious and permanent injuries." He recovered a verdict for the value of the horse and the judgment upon the verdict, by a divided vote, was affirmed by the justices of the Appellate Division.

That part of the Buffalo road, where the accident happened, is just within the corporate limits of the village. The road starts at Main street, in the settled part of the village, and runs west to Wyoming street, which bi-sects it in a northerly and southerly direction. So much of the road is frequently used and the roadbed is well cared for. The other part of the Buffalo road, where the accident occurred, leaves Wyoming street at a point some fifteen to twenty rods south of the above

intersection and, ascending a steep hill, runs in a westerly direction through a territory, so sparsely settled that, for three, or four, miles, there are only three, or four, residences. The soil is loose and is filled with gravel and stones. Rains would wash the roadbed; deep ruts would form and the surface was broken up by, what is termed, the "rough-locking" of wheels of vehicles when descending the hill. Where the plaintiff's horse was injured, on either side of the roadbed, were small ditches, or gulleys; that on the north side being intended to carry off the wash of surface water and that on the south side being a mere washout of about six inches in depth and a foot in width. The plaintiff describes the road as being covered with stones all the way up to the point where the accident happened. He was driving a pair of horses, in the daytime, and, as he endeavored to pass the ditch on the north side of the road, the left-hand horse stepped with one of his fore feet upon a large round stone and fell; his feet sliding into the little gulley on the south side of the road. The horse sprang up, immediately, but was found to be permanently lamed.

It is to be assumed from the plaintiff's case that the roadbed in question was in a bad condition. If all that was necessary, in order to charge the village with a liability, was to prove the presence of loose, or rolling, stones in the roadway and the injuries to the plaintiff's horse from stumbling and falling, the plaintiff made a case for the jury and the question is presented whether there is so extensive a liability resting upon these municipalities. I do not think so. If they can be made responsible in damages for the injurious consequences of a horse stumbling upon the loose stones in a country road, I think it would be crossing the border line between what is reasonable and what is unjust, if not absurd, in such cases. This was a dirt road leading over a steep hill and so rarely used that, as plaintiff says, one would not "see a team, excepting one of these people that I have mentioned living right on that road, on an average, more than once a week." It is true that the village was bound by the law of its organization to

remove loose stones from the highways and that it had failed to perform that obligation upon this particular road that season, up to the date of the occurrence. It had within its corporate limits some twenty-six miles of streets to care for and in failing to keep the roadbed of this rarely used highway free from loose, or rolling, stones, there was ample excuse in that fact, as in the character of the soil, in the circumstances of the steepness of the road ascent and of its being subjected, not only to the washing of surface waters, but to the dragging upon it of the "rough-locked" wheels of descending vehicles.

Where was the actionable, or culpable, negligence upon which the plaintiff could charge the municipality with liability for his horse's mis-step? The village corporation was not bound to use such care and skill as to render accidents impossible upon its ways, or streets. The active vigilance, which is due from it with respect to their maintenance in a fairly safe condition, is a relative term. It was, sensibly, observed in the case of *Glasier v. Town of Hebron*, (131 N. Y. p. 452), that "a thronged thoroughfare in a populous city would require much more attention in regard to its condition as to safety on the part of the officers of the corporation, than would any ordinary highway running through a sparsely settled district of a town." In the present instance, the defendant appears to have kept so much of Buffalo road as lay within the settled portion of the village in good order and if neglecting to live up to the letter of its legal duty, by removing the loose stones from the surface of this rarely used extension of the road, what liability could it come under? For the breach of duty there might be the public prosecution of the municipal officers. But upon what ground shall corporate liability be predicated, when the complaint is, as in this case, that a person's horse was injured by stepping upon loose stones? If the corporation were maintaining a nuisance; or, if it had created by its positive act, or had permitted to continue, a place of danger in the highway, as the result of either of which conditions a resulting injury was complained of, a liability might exist. The idea of the measure of responsibility

of a municipal corporation for accidents happening upon its streets and highways is not to be divorced from reason. Such a country road must not be expected to be ever free from loose stones and because the possibility exists that horses may fall upon it, is the village to be held to so extensive a liability? And shall jurors be permitted to guess that an accident was due to the fault of the way and not to that of driver, or horse?

The duty enjoined by statute to remove loose stones from the highway and, generally, to keep highways in repair, as an obligation, is one which, in the imposition of duties and in the delegation of powers by the legislature with respect to the public highways, is to be deemed for the benefit of the public generally, rather than as "affecting a local, or corporate, interest." The rule of municipal liability, when invoked upon the proof of a neglect of duty with respect to a highway, is not an absolute one. * On the contrary, as it was pointed out in the case of *Lane v. Town of Hancock*, (142 N. Y. 521), upon authority, "the limit of duty on the part of a town with regard to the condition of its highways falls far short of making them absolutely safe, under all circumstances, even for those who use them properly."

Whether such an accident as the one in question ever happened before upon Buffalo road, we are not informed by the record; but if we could say that it is one the possibility of which might have suggested itself, nevertheless, for the court to hold the municipality responsible for its occurrence, would be to make of it an insurer against accidents as to all persons using the way. In my opinion, the evidence disclosed no actionable negligence and, therefore, it was error for the court to submit the case to the jury.

I advise the reversal of the judgment and the ordering of a new trial; with costs to abide the event.

VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur; CULLEN, Ch. J., dissents; HAIGHT, J., not voting.

Judgment reversed, etc.

SARAH McCONNELL, as Administratrix of the Estate of
MATTHEW McCONNELL, Deceased, Respondent, *v.* MORSE
IRON WORKS AND DRY DOCK COMPANY, Appellant.

MASTER AND SERVANT — WHEN EMPLOYEE IS NOT A SUPERINTENDENT WITHIN MEANING OF EMPLOYERS' LIABILITY ACT (L. 1902, CH. 600) — MASTER NOT LIABLE FOR INJURIES CAUSED TO SERVANT BY NEGLIGENCE OR ERROR IN JUDGMENT OF CO-SERVANT. Where it appears, in an action brought to recover for the death of plaintiff's intestate caused by the breaking of a defective ladder negligently selected for decedent to work upon by an alleged superintendent of the defendant, that the decedent was in the service of the defendant as a helper to a steamfitter, or plumber, also working for the defendant; that the latter was employed by the defendant solely as a steamfitter, or plumber, and had been occupied as such during the entire time that he had been in the defendant's service; that the steamfitter had no power to hire or discharge the helper, who was employed by the defendant and directed to serve as a helper to the steamfitter; that they worked together as laborers, doing the same class of work, one as the mechanic, fitting or repairing steam pipes, the other assisting him in that work, the relation between them was merely that of co-employees; and, notwithstanding the fact that it was the helper's duty to obey the directions of the steamfitter with reference to their work, the steamfitter did not occupy the position of, and had never been intrusted with, the powers of a superintendent within the meaning of the Employers' Liability Act (L. 1902, ch. 600). The defendant is not liable, therefore, for the negligence, or error in judgment, of the steamfitter in selecting, for the helper to work upon, an old and defective ladder, which broke and caused the helper to fall, whereby he received injuries from which he died, when there were numerous other ladders upon the premises from which a safe and suitable ladder could have been selected.

McConnell v. Morse Iron Works & Dry Dock Co., 110 App. Div. 920, reversed.

(Argued January 30, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1905, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eugene Lamb Richards, Jr., Rutherford B. Meyer and Frank Verner Johnson for appellant. The plaintiff failed to sustain the burden of proof showing that the accident came from something which was the fault of defendant rather than from another cause for which the defendant is not liable. (*O'Reilly v. B. H. R. R. Co.*, 82 App. Div. 492; *Rupert v. B. H. R. R. Co.*, 154 N. Y. 90; *Huff v. A. F. E. Co.*, 88 App. Div. 324; *White v. N. Y. Central*, 90 App. Div. 356; *Rider v. Syracuse Ry. Co.*, 171 N. Y. 139; *Travell v. Bannerman*, 174 N. Y. 47.) There were plenty of ladders around the premises, and if McConnell or Wilson picked out these two ladders when there were others available, presumably in good condition, the defendant is not liable for the result of that selection. (*Vogel v. A. B. Co.*, 180 N. Y. 373; *Wagner v. N. Y. C. & H. R. R. Co.*, 183 N. Y. 523; *Hackett v. Masterson*, 88 App. Div. 73; *Warszawski v. McWilliams*, 64 App. Div. 63; *Kiffen v. Wendt*, 39 App. Div. 229; *Stourbridge v. B. C. R. R. Co.*, 9 App. Div. 129; *Ivers v. M. D. Co.*, 84 App. Div. 27; *Kimmer v. Weber*, 151 N. Y. 417; *O'Connell v. Thompson-Starrett Co.*, 72 App. Div. 47; *Ulrich v. N. Y. C. & H. R. R. Co.*, 25 App. Div. 465.)

William F. Hagarty for respondent. The court below was correct in holding that the dismissal of plaintiff's complaint was erroneous. (*McNally v. P. Ins. Co.*, 137 N. Y. 394; *Ladd v. A. Ins. Co.*, 147 N. Y. 478; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Witbeck*, 156 N. Y. 349; *Monahan v. Eidlitz*, 59 App. Div. 224; *McDonald v. M. Ry. Co.*, 167 N. Y. 68.) We are well within the Labor Laws of 1897 and 1902. (L. 1897, ch. 415, § 18; L. 1902, ch. 600.) The ladder was defective and there is sufficient evidence that it broke. (*Simone v. Kirk*, 173 N. Y. 7; *Stewart v. Ferguson*, 164 N. Y. 553; *Byrne v. Eastmans Co.*, 163 N. Y. 461; *Tierney v. Funck*, 97 App. Div. 1; *McHugh v. M.*

Ry. Co., 179 N. Y. 378; *Cummings v. Kenny*, 97 App. Div. 114; *Muhlens v. Obermeyer*, 83 App. Div. 88; *Johnson v. Roach*, 83 App. Div. 351; *Samo v. A. S. Co.*, 65 App. Div. 249; *Walters v. Fuller Co.*, 74 App. Div. 388.)

HAIGHT, J. This action was brought to recover damages resulting from the death of plaintiff's intestate through the alleged negligence of the defendant.

On the third day of April, 1903, the decedent and one Robert G. Wilson were in the employ of the defendant, Wilson as a steamfitter or plumber, and the decedent as his helper, and had been so engaged for six or seven months. In the defendant's blacksmith shop there was a small water pipe which ran from the ground up the side of the wall of the building to the ceiling above, and thence along the side of the wall to the plate shop. Near the ground there was a faucet, through which water was supplied to the men for drinking purposes. The pipe up next to the ceiling had split and was leaking, and the foreman of the shop called Wilson's attention thereto and directed him to repair it. The place where the pipe was leaking was about nineteen feet from the ground, and Wilson went to another room in the defendant's plant, found a couple of ladders, which were brought in and placed up against the wall to the pipe that was to be repaired. It is contended on behalf of the defendant that he took his helper, the decedent, along with him to select the ladders; that they brought the ladders in to the place where they were to be used, and that then Wilson sent the decedent into the shop to get a tool with which to cut the pipe; that while he was gone another man, who had come up to the faucet to get a drink of water, helped Wilson put the ladders up against the wall. On behalf of the plaintiff it is contended that the man who came up to get the water also went with Wilson to select the ladders instead of McConnell. The evidence upon this branch of the case is very meager and does not clearly establish which of these persons went with Wilson to get the ladders. We shall, therefore, assume for the purposes of this case that the

ladders were selected by Wilson, and that the man who came for the water assisted him in bringing them in and putting them up. After the ladders had been raised against the wall McConnell returned with the tool for which he had been sent, and he ascended one ladder and Wilson the other. It was necessary to take out a piece of the pipe, and it was accordingly cut at a place above the split, and then it was unscrewed from the joint below, at which time Wilson descended from his ladder, and the pipe so taken out was handed down to him. As he took it and laid it upon the ground, he heard a crack above which sounded like the cracking of wood. He immediately looked up and saw McConnell upon the ladder with one hand holding on and the other down. Almost instantly thereafter he fell backwards, striking a shafting that ran through the shop about three feet from the wall, which was revolving at a speed of one hundred and twenty-five revolutions per minute, and his body was whirled around the shafting, striking a plank nailed upon the beams and the ladder which stood against the wall, breaking them to pieces. Wilson immediately ran to the engine room to shut off the power and when he returned McConnell was dead. The evidence tended to show that the ladders selected were old, worn and defective, but that there were numerous other ladders upon the plant which could have been selected had Wilson looked farther.

Upon the trial, at the close of the plaintiff's case, the trial judge, upon motion, ordered a nonsuit, upon the ground, as stated by him, that the evidence failed to show that the ladder upon which McConnell was standing had broken causing him to fall. The Appellate Division has reversed, holding that the evidence of Wilson, with reference to the cracking, was sufficient to raise a question of fact for the jury.

The evidence with reference to the breaking of the ladder causing McConnell to fall was very slight, but we incline to the view that it was sufficient to carry the case to the jury and to sustain a finding that the ladder was defective, and by reason thereof broke and caused the accident. It, however,

distinctly appears that the ladder was procured by Wilson and that there were other ladders upon the premises, from which a proper selection might have been made. It was, therefore, negligence on his part in selecting an improper and defective ladder. The question is thus presented as to whether the defendant is liable under the circumstances. If Wilson was a co-employee merely with McConnell, then the defendant would not be liable, but it is contended that under the Employers' Liability Act (Laws of 1902, chap. 600) he was a superintendent, and as such the defendant was liable for his negligent acts. The statute provides as follows:

"Section 1. Where, after this act takes effect, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time: * * *

"2. By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; the employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act."

It will be observed that the statute refers to the individual whom the employer has intrusted with, and whose sole and principal duty is that of exercising superintendence. Were such the duties of Wilson? He was employed by the defendant as a steamfitter or plumber and had been occupied as such during the entire time that he had been in the defendant's service. As he testified, he had no power to hire or discharge

his helper, but that McConnell was employed by the defendant and was directed to serve as Wilson's helper. It thus appears that they were laborers engaged together doing the same class of work, Wilson as the mechanic fitting or repairing pipes and McConnell assisting him in the work. While it is true that it was McConnell's duty to obey Wilson's directions with reference to handing him tools and waiting upon him in various ways which were necessary in the conduct of the work, we are clearly of the opinion that the relation between them was merely that of co-employees and that Wilson did not occupy the position of, and had never been intrusted with, the powers of superintendent within the meaning of the statute to which we have referred. Wilson was employed as a steamfitter or plumber; his duties pertained to that class of work. McConnell was employed to help and assist him — nothing more. The case, therefore, is brought within the rule so often recognized and applied in this court, to the effect that where the master has upon hand at the place where the work is performed sufficient suitable material or appliances for the doing of the work, he is not liable for injuries resulting to a workman by reason of an error in judgment of the foreman or of a co-employee in selecting defective material or appliance. (*Vogel v. Am Bridge Co.*, 180 N. Y. 373; *Kimmer v. Weber*, 151 N. Y. 417, and cases cited.)

It follows that the error in judgment of Wilson in selecting the defective ladder which broke and caused McConnell to fall, when there were numerous other ladders upon the premises from which a suitable ladder could have been selected, is not an act for which the defendant can be held liable.

The order of the Appellate Division should, therefore, be reversed, and the judgment upon the nonsuit affirmed, with costs.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Order reversed, etc.

WILLIAM A. BRADSHAW et al., as Executors of ROBERT C. BRADSHAW, Deceased, Appellants, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

1. INSURANCE — TESTAMENTARY DISPOSITION BY WIFE OF POLICY OF LIFE INSURANCE ISSUED FOR HER BENEFIT. The statutes relating to life insurance issued for the benefit of a married woman, and authorizing her to dispose by will of the policy of insurance, refer to a contract made by her in her own name or in the name of a third person, with his assent as her trustee, for insurance upon the life of her husband, and not to a contract made by him for her benefit.

2. WHEN WIFE'S INTEREST IN POLICY IS CONTINGENT AND DOES NOT PASS BY HER WILL. A wife has a contingent, not an absolute, interest in a policy of life insurance issued upon the application of her husband, who paid the premiums and made it payable to her "for her sole use, if living, in conformity with the statute, and if not living to their children or their guardian for their use;" her interest is solely dependent upon her surviving her husband, and in that event only is she entitled to dispose of the policy by will; in case of her death without issue, before her husband, the proceeds upon his death pass, not to her, but to her husband's executors.

Bradshaw v. Mutual Life Ins. Co., 109 App. Div. 375, reversed.

(Argued January 17, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 2, 1906, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury.

On the 16th day of January, 1882, on the application of Robert C. Bradshaw, the defendant issued to him a policy of insurance on his life, by which, in consideration of said application and of the statements made therein, and of the premiums specified in said policy, the defendant promised to pay "Unto Corrie J. Bradshaw, wife of Robert C. Bradshaw, of Jamestown, in the county of Chautauqua, state of New York, for her sole use, if living, in conformity with the statute, and if not living to their children, or their guardian for their use," the amount of the policy in sixty days after satisfactory

proof of the death of said Robert C. Bradshaw. Robert C. Bradshaw and Corrie J. Bradshaw were husband and wife, and each died without ever having had a child.

Said Robert C. Bradshaw paid the premiums on said policy until his death, which occurred on the 19th day of April, 1901. Said policy of insurance was never delivered to or in the possession of said Corrie J. Bradshaw, but was retained by said Robert C. Bradshaw, and was found in his possession at the time of his death. Corrie J. Bradshaw died on the 3rd day of July, 1896, leaving a will which has since been duly admitted to probate. After her death said Robert C. Bradshaw wrote the defendant stating that Corrie J. Bradshaw named in said policy was dead, and that he desired the policy made payable to his estate. Affidavits were prepared by a general agent of the defendant which were forwarded to the said Robert C. Bradshaw to be signed by him, and they were signed and sworn to by him as requested, in which affidavits the number, date and amount of the policy were stated, and it was further therein stated that said Corrie J. Bradshaw left a will which had been duly probated and that she owed no debts, which statements were true. Subsequently and on the 6th day of September, 1896, said general agent with full authority of the defendant wrote said Robert C. Bradshaw and referring to the prior correspondence said: "You filed the affidavit of the death of Mrs. Bradshaw, which is all that is necessary to do in the matter; the records of the company will show the fact and your policy has been made payable to your estate." The policy was not in fact made payable to his estate.

Robert C. Bradshaw left a will which has been duly admitted to probate and the plaintiffs have been duly appointed executors of said will. This action is brought by them against the defendant to recover the amount of said policy.

The only reason alleged or claimed why the plaintiffs should not recover in this action is that said policy from the time of its execution and delivery became the property of Corrie J. Bradshaw, and passed to her residuary legatees under her will

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upon her death. Said policy is not specifically given by her will but her said will contains a general residuary clause. The trial court held in accordance with the claim of the defendant, but rendered judgment in favor of the plaintiffs for \$91, being the amount of the premiums paid by Robert C. Bradshaw from September 6th, 1896, the date of said letter, to the time of his death. An appeal was taken by the plaintiffs to the Appellate Division where the judgment of the trial court was affirmed, from which judgment of affirmance an appeal is taken to this court.

A. C. Wade for appellants. The policy did not pass by the will of Corrie J. Bradshaw to her representatives. (*Harvey v. Van Cott*, 71 Hun, 394; 149 N. Y. 579.) The policy was the property of Robert C. Bradshaw, and, when his wife died prior to his death, leaving no children, he had the right, on consent of the company, of changing the beneficiary. (*Bickerton v. Jaques*, 28 Hun, 119.)

Charles E. Hotchkiss and *Julian C. Harrison* for respondent. The contract sued on, by its terms, invokes the statute, which was in the nature of an enabling act, permitting a wife to insure her husband's life. The policy is, therefore, a "statutory wife policy." (Bliss on Life Ins. § 10; *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 144; *Ruse v. M. B. L. Ins. Co.*, 23 N. Y. 516; *Eadie v. Slimmon*, 26 N. Y. 9; *Olmstead v. Keyes*, 85 N. Y. 593; *Brummer v. Cohn*, 86 N. Y. 11; *Bloomington v. Lisberger*, 24 Hun, 355; *Wilson v. Lawrence*, 76 N. Y. 585; *Walsh v. M. L. Ins. Co.*, 133 N. Y. 408; *Anderson v. Goldschmidt*, 103 N. Y. 617.) The statute makes the policy the property of the wife and gives to her the power to dispose of it by will. It passed to the executrix of the wife under the residuary clause of her will. (*Harvey v. Van Cott*, 71 Hun, 394; *U. S. T. Co. v. M. B. L. Ins. Co.*, 115 N. Y. 152; *Laflin v. Norcross*, 97 Me. 33.) The defendant was unable by any act of its own to confer any right upon Robert C. Bradshaw and so take away from

his wife's executrix the right to the proceeds of the policy. (*Henry v. Ritenauer*, 31 Ind. 136; *M. S. Bank v. Goff*, 13 R. I. 516; *Burgess v. Badger*, 134 Ill. 288; *Vance v. R. C. Mfg. Co.*, 82 Fed. Rep. 252; *Ridgway v. Grace*, 2 Misc. Rep. 293; *Thorne v. Deas*, 4 Johns. 484; *Hollins v. Hubbard*, 165 N. Y. 534; *Gerhardt v. Bates*, 2 El. & Bl. 487.)

CHASE, J. The policy was the contract of Robert C. Bradshaw with the defendant. Both Robert C. Bradshaw and the defendant being competent to contract, were free to make such contract as they could agree upon.

Insurance, like other contracts, should be interpreted to carry out the intention of the parties, giving the language employed its common and ordinary meaning. If the policy had been made payable to Corrie J. Bradshaw in case she survived her husband, and in case she did not survive her husband then to the children of said Corrie J. and Robert C. Bradshaw, or in case said Corrie J. Bradshaw should not survive her husband and she should not leave a child or children her surviving, then to the executor or administrator of said Corrie J. Bradshaw, the contract would not only have been enforceable, but the intention of the parties in case Corrie J. Bradshaw did not survive her husband, and did not leave a child or children her surviving, would have been clear and it would not have required judicial interpretation.

If, on the other hand, the policy had provided that if Corrie J. Bradshaw should not survive her husband and she should not leave a child or children her surviving, then to the executor or administrator of said Robert C. Bradshaw, the contract would have been equally clear and enforceable.

Language was used in the policy about the meaning of which the parties to this action are in dispute and about which the defendant has apparently become doubtful since the correspondence with the insured in his lifetime.

It is conceded that had said Corrie J. Bradshaw been living at the death of Robert C. Bradshaw the policy would have been payable to her for her sole use in conformity with the

statute. It is also conceded that if Corrie J. Bradshaw had left children of her marriage with said Robert C. Bradshaw the proceeds of the policy would have been payable to such children or their guardian for their use.

Corrie J. Bradshaw having died before her husband without leaving a child or children her surviving, where in the policy does it appear that the proceeds thereof would pass by her will?

There is no language in the policy which in itself expresses any such intention of the parties. It is claimed by the defendant that it is included within the provisions of the policy making it payable to Corrie J. Bradshaw for her sole use if living, *in conformity with the statute*. This makes it necessary for us to look at the statutes to see if there is anything therein that compels a construction which would seem to be contrary to the ordinary meaning of the language used.

Chapter 80 of the Laws of 1840 made it lawful "For any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband." And it provided that in case of her surviving her husband the amount of the insurance "shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors," except where the amount of the annual premium exceeds a sum stated. The act also provided that "In case of the death of the wife, before the decease of her husband, the amount of the insurance may be made payable after her death to her children for their use, and to their guardian, if under age."

Chapter 187 of the Laws of 1858 is, with the exception of certain verbal changes that are not now important, the same as chapter 80 of the Laws of 1840.

This court in *Eadie v. Slimmon* (26 N. Y. 9, 17) stated the reasons and purposes of such statutes. From the opinion we quote as follows:

"By the common law a person could insure his own life for any sum for which he might choose to pay the premium, and

which the insurers would engage to insure; but if one desired to insure the life of another, he could only insure the interest which he had in such other life. If he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual damages sustained the contract would be void under the statutes against betting and gaming. This principle the legislature by the act of 1840 (Laws, p. 59) relaxed in respect to insurance as effected by a married woman, for any sum which she and the insurance company might see fit to contract for. It was provided that, in the case of her surviving her husband, the amount payable by the terms of the policy should be payable to her for her own use, free from all claims of the representatives of her husband or of his creditors. There is another feature in the act which shows that it was an enabling and not a declaratory provision. By the general rules of law a policy on the life of one sustaining only a domestic relationship to the insured, would become inoperative by the death of such insured in the lifetime of *cestui que vie*; or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act the contract may be continued in favor of the children of the insured wife after her death. These features distinguish this case from that of an ordinary chose in action belonging to a married woman as her separate estate. The provision is special and peculiar and looks to a provision for a state of widowhood, and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property or an ordinary security for money."

Changes were made in these acts by chapter 70 of the Laws of 1862, chapter 656 of the Laws of 1866, chapter 277 of the Laws of 1870, and chapter 821 of the Laws of 1873. And when the policy in question was given the statutory authority of a married woman to insure the life of her husband for her sole use, so far as now material, remained the same as stated in

said chapter 80 of the Laws of 1840, and the act as amended then provided that the policy "shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through or under him." (L. 1870, ch. 277, sec. 1.)

And the second section of the act provided that "Any policy in favor of a married woman, or of her and her children, or assigned in her, or in her and their favor, on written request of said married woman, * * * may be surrendered to and purchased by the company issuing the same in the same manner as any other policy. And such married woman may, in case she have no child or children born of her body, or any issue of any child or children born of her body, dispose of such policy in and by a last will and testament, or any instrument in the the nature of a last will and testament * * * which disposition lawfully made shall invest the person or persons to whom such policy shall have been so bequeathed, or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, * * *." (L. 1873, ch. 821, sec. 2.)

All of these acts in terms relate to insurance on the life of a husband when taken by the wife in her name or in the name of a third person with his assent as her trustee for her sole use. All of these acts were repealed with the passage of the Domestic Relations Law (Chapter 272, Laws of 1896), and the substance of the several acts was codified, restated and somewhat modified by section 22 of said Domestic Relations Law.

Said section 22 of the Domestic Relations Law also provides: "A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured." This was in part taken from chapter 248 of the Laws of 1879 which last act was also repealed with the passage of said Domestic Relations Law.

It will be seen, therefore, that the statutes authorize a mar

ried woman to enter into a contract with an insurance company for insurance in her name or in the name of a third person with his assent as her trustee on the life of her husband, and they also recognize that insurance may be taken by a person on his own life for the benefit of a married woman. It is an insurance contract of the former class that is referred to in the statutes that we have quoted giving a married woman power to dispose by will of such policy of insurance. The right to dispose of insurance by will is based upon the vested interest which the wife has in the insurance. The statutes providing that insurance taken by a wife on the life of her husband may be made payable after her death to her children for their use and to their guardian if under age is permissive, and when a policy is so made payable it is a contingent limitation upon the married woman's absolute title to the proceeds of the policy which has resulted from her individual contract.

Corrie J. Bradshaw's interest in the policy in question was never absolute but contingent. She did not have an unconditional assignable interest in the policy. The sole condition upon which the policy was ever to become payable to her or through her, was that she survive her husband.

In the policy under consideration the use of the words "In conformity with the statute" is necessarily related to the receipt of the proceeds of the policy in the lifetime of Corrie J. Bradshaw and of her holding the same free from the claims of the representatives of the husband or any of his creditors or any party or parties claiming by, through or under him.

By the statute in force when the policy was given a married woman who had no child or children could dispose by will of a policy which is governed by said statutes and is payable "in favor of a married woman, or of her and her children, or assigned in her, or in her or their favor, on written request of said married woman."

The difficulty with the defendant's position is that the policy in question does not come within the terms of the statute authorizing a married woman to dispose of such policy by

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will, and that the language of the policy shows that Corrie J. Bradshaw's interest in the policy was wholly dependent upon her surviving her husband.

Most of the authorities mentioned in the prevailing opinion of the Appellate Division on the decision of the appeal in that court (109 App. Div. 375), and which are relied upon by the respondent in this appeal, are referred to, and satisfactorily explained and distinguished from this case in the dissenting opinion therein.

That the interest of a married woman in a policy of insurance, even if construed under the statutes, is subject to such limitations as are contained in the policy is held in *U. S. Trust Co. v. Mutual Ben. Life Ins. Co.* (115 N. Y. 152); *Walsh v. Mut. L. Ins. Co.* (133 N. Y. 408), and *Fidelity Trust Co. v. Marshall* (178 N. Y. 468).

Corrie J. Bradshaw, having died before the insured, had no interest in the policy that survived her death.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN and WERNER, JJ., concur; HISCOCK, J., not sitting.

Judgment reversed, etc.

In the Matter of the Accounting of AUGUSTUS B. KELLOGG et al., as Executors of EDWIN L. BURDICK, Deceased, Appellants.

ALICE H. BURDICK, Individually and as Guardian of MARION BURDICK et al., Respondent.

WILL — WHEN TESTAMENTARY APPOINTMENT OF GUARDIANS IS VOID — WHEN DIRECTIONS TO APPOINTEES AS TO CUSTODY OF FUNDS CONSTITUTE A VALID POWER IN TRUST. While a testamentary appointment of guardians for testator's minor children, to whom he bequeathed his estate, is void under the Domestic Relations Law (L. 1896, ch. 272) because it excluded the mother, who survived him, a direction that "all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as such guardians" is effective. The testator could not say who should have the custody and control of the property of his

infant children generally, but he had entire power to say who should have the custody and control during their respective minorities of that part of his property that he chose to give to them. He could leave the title in the minors and create a power in trust for the control and management of the fund, and such direction must be regarded as creating a valid power in trust.

Matter of Kellogg, 110 App. Div. 472, reversed.

(Argued January 8, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 10, 1906, which affirmed a decree of the Erie County Surrogate's Court judicially settling the accounts of the executors herein and adjudging that the fourth paragraph of the will of Edwin L. Burdick, deceased, is null and void, and that no trust powers or powers in trust or powers of management were bestowed or authorized by said will upon the executors as executors, trustees or otherwise, and further adjudging that said executors pay over to Alice H. Burdick, as guardian of her three infant daughters, the balance of funds remaining in their hands belonging to said infants amounting to \$32,381.23.

Edwin L. Burdick died in the city of Buffalo February 27th, 1903, leaving his widow, Alice H. Burdick, and three daughters; all of the children are minors. By the first and second subdivisions of his will the testator provided for the payment of debts and funeral expenses and several specific legacies.

The remainder of the will is as follows: "*Third*. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of every description, to my three children (naming them), to be divided equally between them, share and share alike, and in case either of my said children shall die before the age of twenty-one, I direct that the share of her so dying shall be equally divided between the surviving children, share and share alike. *Fourth*. I nominate and appoint Charles S. Parke and Risley Tucker to be guardians of the persons of my three children, and Augustus

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B. Kellogg, George H. Dunston and George C. Miller to be the general guardians of the estates of each of my three children, and I direct that all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as such guardians. *Fifth.* (Testator nominates and appoints said Kellogg, Dunston and Miller executors.) *Sixth.* I authorize and empower my said executors to sell and dispose of at public or private sale and at such times and in such manner and for such sums as to them, in the exercise of their best judgment, may seem most expedient, and to convey all or any part of my real estate or personal estate, and to continue and carry on, or close out and wind up, my interest in the various business enterprises in which I may be engaged, as to them may seem best and most expedient for all parties concerned. *Seventh.* I hereby revoke all former wills by me made."

George C. Miller and William C. White for appellants. The fourth paragraph of the will conferred upon the executors named therein trust powers of management of the estates of the children bequeathed by the will of Edwin L. Burdick. (*Post v. Hover*, 33 N. Y. 593.) The legacies to the children are conditional only, and show an intention to postpone the payment of their shares during the period of their minorities. (*Mead v. Maben*, 131 N. Y. 255.) The intention of the testator should govern. (*Du Bois v. Ray*, 35 N. Y. 162; *Lambert v. Paine*, 3 Cranch, 129; *Johnson v. Brassington*, 86 Hun, 106; *Lawton v. Corlies*, 127 N. Y. 100.)

Frederick B. Hartzell for respondent. The power to appoint a testamentary guardian is statutory. (2 R. S. [6th ed.] 167, §§ 1, 2, 3.) The surviving parent only has power to appoint. (L. 1893, ch. 175; L. 1896, ch. 272.) The mother having been appointed guardian of the infant children by the surrogate, she takes the control and management of the estates as well as the persons of her wards. (*Matter of Alexandre*, 70 N. Y. S. R. 431.) To spell a trust, or a power in trust, into the will would violate the natural and legal rights of the mother.

(*Kevan v. Waller*, 36 Am. Dec. 391; *Matter of Briggs*, 39 App. Div. 485.) The attempted appointment of guardians being void, the court will not declare them trustees. (*Brigham v. Wheeler*, 49 Mass. 127; *Matter of Hawley*, 104 N. Y. 250.)

CULLEN, Ch. J. By the will of Edwin L. Burdick, deceased, he provided: "*Fourth*: I nominate and appoint Charles S. Parke and Risley Tucker to be guardians of the persons of my three children, and Augustus B. Kellogg, George H. Dunston and George C. Miller to be the joint guardians of the estates of each of my three children, and I direct that all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as such guardians." The testator left him surviving three daughters, all infants, and a widow, the mother of said infants. Subsequent to his decease and the probate of his will the widow was appointed general guardian of the infants. The question arose whether the property, which, under the terms of the will, to which it is unnecessary to refer, was given to the infants should be paid over to the mother as their general guardian or to the three persons named as guardians in the clause of the will quoted, who are the appellants in this case. The surrogate directed payment of the funds to the general guardian, and this direction has been affirmed by the Appellate Division.

That, under the statute of 1893 (Ch. 175; subsequently re-enacted in Domestic Relations Law, ch. 272, Laws 1896), which constitutes a married woman joint guardian of her children with her husband, and restricts to the surviving parent the authority to appoint a testamentary guardian, the appointment of the appellants as guardians of the persons and property of the infants was void, cannot be questioned. But this concession does not dispose of the controversy. While the testator could not say who should have the custody and control of the property of his infant children generally, he had entire power to say who should have the custody and control during their respective minorities of that part of his

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property that he chose to give to them. He might have created a trust in her favor during the minority of each child, in which case the legal title during the trust term would be in the trustee. He was not, however, bound to adopt that course. He could leave the title in the minors and create a power in trust for the control and management of the fund. A power may be created for any lawful purpose and to do any act which the grantor might himself do (Real Property Law, sec. 111; *Belmont v. O'Brien*, 12 N. Y. 394; *Downing v. Marshall*, 23 N. Y. 366), and the statute equally applies to powers over personalty. (*Cutting v. Cutting*, 86 N. Y. 522.) Therefore, had the testator instead of appointing the appellants guardians of his children with the direction "that all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as said guardians," said in express terms, "I direct said persons to have the same care, custody and control during their minority over the property I give my children that a guardian would have," it would have created a valid power in trust (*Blanchard v. Blanchard*, 4 Hun, 287; *affd.*, 70 N. Y. 615), and to my mind he has said substantially the very same thing.

There have been several cases in which a testator not legally authorized to do so has assumed to appoint the guardian of minor beneficiaries under his will. In such cases, with but a single exception, so far as I can find, the appointment of a guardian over such property as the testator bequeathed or devised has been upheld either as a trust or a power in trust. The exception is *Brigham v. Wheeler* (49 Mass. 127), where a testator, having given real and personal property to the children of his nephew, assumed to appoint their guardian. It was held that the appointment was void and the will could not be construed so as to create a trust estate in the guardian. The case was disposed of summarily without any review of the authorities. On the other hand, in *Fullerton v. Jackson* (5 Johns. Ch. 278), where a grandfather assumed to appoint his executors guardians of his

grandchild, Chancellor KENT held that while the grandfather had no such power he had a right to annex conditions to his gift, and that the rents and profits of the property devised should remain in the hands of the executors. In *Post v. Hover* (33 N. Y. 593) a testator appointed a guardian of minor grandchildren and directed that his son, whom he named guardian, should have the control and management of the real estate devised to the grandchildren during their minority. It was held that while the appointment of guardian was void, and no valid trust created, still there was constituted a good power in trust. Judge DENIO said: "A grandfather, it is true, has no power to appoint a guardian for his grandchildren by last will. This testator thought otherwise, and by assuming to do so, he may be supposed to indicate the kind of authority which he intended to commit to his son John. He intended to confer such a charge of, and power over, the estate, as a guardian may rightfully exercise over the lands of his ward." In *Matter of Lichtenstadter* (5 Dem. 214), where a testator appointed a guardian of his grandchild, it was held by Surrogate ROLLINS that though the attempt to create a guardian was abortive the person appointed was a trustee and entitled to the possession of the fund without obtaining letters of guardianship. In *Blake v. Leigh* (Ambler's Rep. 306) it was held that "the grandfather has no power to appoint guardians of his grandson, it being a right vested in the father; but anyone can give his estate on what conditions he pleases." In *Grimsley v. Grimsley* (79 Ga. 398) it was held that under the appointment of one as testamentary guardian of children of a person other than the testator the appointee became a trustee for such children and held the property devised as such. In *Camp v. Pittman* (90 N. C. 615) it was held that the appointment by a testator of a testamentary guardian whom he was not authorized to appoint operated to define the power and authority over the estate conferred upon the guardian. In *Vanartsdalen v. Vanartsdalen and Cornell's Appeal* (14 Pa. St. 384) there was a similar attempt on the part of a testator to appoint a guardian of his

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grandchildren. The contest was between the testator's son-in-law, the father of the infants, and the testator's son, whom he appointed guardian of the children. The son-in-law sought to get possession of the property devised to his children by the testator. He was defeated, the court saying: "Here the testator devises an estate to his grandchildren, and for satisfactory reasons best known to himself chooses to commit the custody and management of it to his own son instead of to his son-in-law. It does not need the authority of Lord HARDWICKE (doubtless referring to *Blake v. Leigh*) for the position that any one can give his estate on what conditions he pleases." In *Bush v. Bush* (2 Duvall [Ky.], 269) it was held that while no other person than a parent can appoint a guardian by will, any other testator may appoint a trustee to take charge of a bequest made to infants. It thus appears that with the exception of the Massachusetts case the uniform current of authority sustains the validity of the appointment of the appellants to exercise over the property bequeathed by the testator the same power as would be exercised by a legally constituted guardian.

The orders of the Appellate Division and of the Surrogate's Court should be reversed and the fund be directed to be paid over to the appellants to be held by them during the minority of the infants respectively, with costs to appellants to be paid out of estate.

- EDWARD T. BARTLETT, J. (dissenting). It is conceded that the fourth paragraph of the will appointing testamentary guardians is void in view of the provisions of the Domestic Relations Law, section 51, which reads as follows: "A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to
- be born, or of any living child, under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its

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minority or for any less time, to any person or persons. Either the father or mother may in the lifetime of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority. A person appointed guardian in pursuance to this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such deed executed and recorded as provided by section twenty-eight hundred and fifty-one of the Code of Civil Procedure."

The history of the legislation in this state resulting in this section quoted is interesting as disclosing the intention to further enlarge the rights of married women. The provisions of an ancient English statute were embodied in our Laws of 1787 (Chap. 47, § 11), which were afterwards incorporated into the Revised Statutes. This statute authorized a father to dispose of the custody and tuition of his infant children, the wife having no rights in the premises.

By the Laws of 1862 (Chap. 172) the existing statute was amended so as to require the consent of the mother to a testamentary appointment by the father, but this legislation in favor of the wife was repealed by the Laws of 1871 (Chap. 32). Then followed Laws of 1893 (Chap. 175); Laws of 1896 (Chap. 272), and the revision of the whole subject by the Domestic Relations Law (§ 51 and following).

The judgments of the Surrogate's Court and the Appellate Division declaring the fourth paragraph of the will void do not rest on the concession of the appellants that such is the fact, but upon the face of the will and the plain reading of the statute quoted. It is the contention of the appellants that notwithstanding the will and the statute there can be spelled out of the former the intention of the testator to create a power in trust which will vest the property passing under the will in the executors as trustees, thereby conferring upon them the absolute control of all property to which the three infant children of the testator are entitled and stripping the widow of every vestige of the rights and powers conferred upon her by statute, as the guardian of her children; it fol-

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lows that such will be the effect, for in depriving her of the control of the property it practically removes the infants from her personal supervision to a very great extent. It leaves her vested with a barren, worthless right.

It would have been, of course, competent for the testator to have left his property to his infant children in trust during their minorities and named such trustees as he saw fit. In that event it would have been incumbent upon him to have indicated the scope and purposes of the trust and defined explicitly the powers of the trustees. This he did not do.

We come back then, *first*, to the will and the statute and their effect upon the theory of a power in trust; and, *second*, to the decisions on which the assumption of such a power rests. The statute (Domestic Relations Law, section 51) in its opening sentence creates a married woman the "joint guardian of her children with the husband, with equal powers, rights and duties with regard to them." Either dying, the survivor may by deed or will "dispose of the custody and tuition of such child, during its minority, or any less time, to any person or persons." Then follows a provision that in the lifetime of both either may appoint the other the guardian of the person and property of the child. The legislature has thus gone far towards completing the emancipation of the married woman from the bondage of the common law; the statutes relating to married women from 1848 until a recent date have established in them the right to acquire, hold and dispose of property, and the legislation we are now considering has made them the equals of their husbands in the custody, tuition and property of their children.

An examination of the will discloses the fact that the testator, regardless of the statute and the rights it confers upon a wife, did precisely what it prohibited, and appointed separate male guardians of the persons and the estates of his three minor children—two of them under fourteen years of age. The only direction he gives to the guardians of the estate is the following: "I direct that all funds and securities belonging to each of my children shall be received, held and paid

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out by them as guardians." As to the guardians of the persons, no direction or suggestion is given.

The will confers upon the executors (who are also named as guardians of the estates of the infants) power to sell and convey real estate and personal property, and to continue or wind up the business of the testator. This record does not disclose why the testator ignored his wife in making his will, nor is it of the least importance, for the question now to be decided is of great public moment. Is a testator who, by his will and the appointment of guardians therein, finds himself barred by the statute in his attempt to deprive his wife of the rights and powers conferred upon her by that statute, entitled to invoke a principle of equity and have his will in that regard turned into a power in trust? To ask the question is to answer it. No case has been cited where such a practice has been permitted under the statute as it now exists. It is an anomaly to appeal to equitable principles under such circumstances. The testator has given his estate to his infant children, and to that extent his will can be sustained, but he ought not to be permitted to deprive the widow of her statutory rights under a mere legal fiction he is in no position to invoke.

The cases cited in support of the appellants' contention are so different in their facts as to be, in our opinion, of no authority on this appeal. In the case of *Blake v. Leigh* (Ambler's Repts. part 1, 306), decided in 1756, Lord HARNWIOKE, Chancellor, said: "The grandfather had no power to appoint a guardian of his grandson, it being a right vested in the father; but any one can give his estate on what condition he pleases; and the father has in this case submitted to the will. There are instances where grandfather has given his estate to grandchild, and appointed guardians of his estate and person; and if the father did not submit to the will, the court has made the father's opposition work a forfeiture of his son's estate."

In *Fullerton v. Jackson* (5 Johns. Ch. 278) a grandfather devised to his grandchild certain real estate, and directed that

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the rents and profits be applied by his executors to the education of such grandchild during his minority. He also directed that his executors be his guardians and direct his bringing up and education as in their judgment appeared proper. The surrogate had appointed a guardian of the infant without regard to this provision in the will. Chancellor KENT said: "In the present case the testator intended that the rents and profits of the land devised during the minority of the grandson, should be appropriated by the executors toward his education. He had a right to annex that condition to the gift; and I do not see that I am required by any principle to call those rents and profits out of the hands of the executors and place them under the discretion of the guardian. The defendants have no control of the infant, but those rents and profits must be left to their control; and if the guardian will not allow them to appropriate the same in such manner as they shall deem best towards the education of the infant, he must be educated with other resources; and the defendants will be responsible to the infant when he comes of age for those rents and profits with interest thereon."

In this case the question of a power in trust is not involved.

In *Post v. Hover* (33 N. Y. 593) a grandfather devised certain real estate to three grandchildren and directed one John Hover, his son, to take charge of and have the management of the infants' estate during their minority and support them and their mother; he also constituted his son John guardian of the three grandchildren and one of the executors of his will. One of the principal questions in the case was whether John Hover took any estate in the lands devised to the grandchildren. It was argued that if John Hover did take an estate or interest in these lands it would create an unlawful suspension of the power of alienation. DENIO, Ch. J., said (pp. 599-600): "But I am of opinion that John Hover did not, by the terms of this will, take any estate in the part of the homestead devised for the benefit of the grandchildren. There are no words importing a devise to him and he is not called a trustee. Ample power of management and

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a right to receive the rents and profits are indeed given, but these duties could very well be executed under a trust power. So far as the grandchildren, who are the principal beneficiaries, are concerned, they might be performed by a general guardian. * * * A guardian, as is well known, has no estate in the lands of his ward, but only a power of management. A grandfather, it is true, has no power to appoint a guardian for his grandchildren by last will. (*Fullerton v. Jackson*, 5 Johns. Ch. 278.) This testator thought otherwise, and by assuming to do so he may be supposed to indicate the kind of authority which he intended to commit to his son John. He intended to confer such a charge of and power over the estate as a guardian may rightfully exercise over the lands of his ward. This repels the idea of the devise of a legal title nearly as strongly as if he had possessed the power which he attempted to exercise."

It is difficult to see what application this case has to the one at bar. We have here an executor who has conferred upon him, according to the judgment of the court, "such a charge of and power over the estate as a guardian may rightfully exercise over the lands of his ward." The learned judge seems to have used the reference to a trust power by way of illustration. He said: "Ample powers of management and a right to receive the rents and profits are indeed given, but these duties could very well be executed under a trust power." Assuming, however, that the last two cases are to be deemed authority for the proposition that interested parties may appeal to the doctrine of a power in trust in order to cure an otherwise invalid provision of the will, we are, nevertheless, of opinion, for reasons already stated, that they have no application to the situation now presented.

In this connection the respondents have called attention to the case of *Brigham v. Wheeler* (49 Mass. 127). A testator, by his will, gave real and personal property to the children of his nephew and their heirs and assigns forever, and appointed their father to be their guardian, without giving bonds, "for the purpose of receiving and managing said

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property so given." It was held that said appointment of a guardian was void, for want of authority in the testator, and that the will could not be so construed as to vest an estate in trust in the father of the children.

In view of the peculiar facts in the case at bar and the statute cited the decisions of the courts of other states are not in point.

The questions in this case were raised by the widow in the proceedings instituted by the executors under the will to obtain their final discharge. In that proceeding the widow appeared as the general guardian of the person and estate of her daughter over fourteen years of age, and the temporary guardian of the persons and estates of her two daughters under fourteen years of age. She filed objections to the account of the executors and secured a decree declaring the fourth paragraph of the will null and void, and directing payment to her of the sum or \$32,381.23 and accrued interest thereon, as the guardian of the persons and estates of the infants. This decree has been affirmed by the Appellate Division.

The judgment of the Appellate Division affirming the decree of the Surrogate's Court of Erie county should be affirmed, with costs.

HAIGHT, VANN and WILLARD BARTLETT, JJ., concur with CULLEN, Ch. J.; WERNER, J., concurs with EDWARD T. BARTLETT, J.; HISCOCK, J., not sitting.

Ordered accordingly.

JOHN RAMSAY, Respondent, v. NICHOLAS J. HAYES, as Fire Commissioner of the City of New York, and Trustee of The New York Fire Department Relief Fund, Appellant.

NEW YORK FIRE DEPARTMENT—REMEDY OF RETIRED MEMBER AGGRIEVED BY ACTION OF COMMISSIONER IN FIXING PENSION IS BY DIRECT PROCEEDING NOT BY ACTION—BURDEN OF PROOF. A recovery in an action by a retired fireman of the city of New York to recover arrears claimed to be due on his pension by reason of an alleged unlawful determination of the fire commissioner as to its amount (L. 1901, ch.

466, § 790), even if the action were maintainable, could not be sustained, where the plaintiff fails to meet the burden imposed upon him of proving that the commissioner had violated his duty in fixing the amount of the pension; such action, however, is not maintainable; the remedy of any member of the department aggrieved by the action of the commissioner in determining his pension is to correct that determination by a direct proceeding, such as mandamus, not by action.

Ramsay v. Hayes, 112 App. Div. 442, reversed.)

(Argued January 16, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 26, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

William B. Ellison, Corporation Counsel (James D. Bell of counsel), for appellant. The plaintiff was not entitled as matter of law to have his pension fixed at \$800 per annum. (L. 1901, ch. 466, § 790; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Wood v. Terry*, 4 Lans. 80; *Ensign v. McKinney*, 30 Hun, 249; *People ex rel. Langdon v. Dalton*, 46 App. Div. 264.)

Charles J. Ryan for respondent. The amount to which the plaintiff is entitled as pension is fixed by statute and the fire commissioner has no discretion in the matter. (L. 1901, ch. 466, § 790.)

CULLEN, Ch. J. The action is brought by a member of the fire department of the city of New York who had been retired under the provisions of section 790 of the Greater New York charter (Laws 1901, ch. 466), to recover from the defendant, who by law is the trustee of the fire department relief fund, arrears claimed to be due on his pension. The complaint alleges that the plaintiff after continuous service in the department for more than ten years was, on March 4th,

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1903, retired by the fire commissioner, and that by said order of retirement his pension was fixed at the sum of \$533.33 per annum, the receipt of which the plaintiff admits, but he charges that under the law he is entitled to receive \$800 per annum, and judgment is demanded for the difference between the sum received by the plaintiff and that which he claims he is entitled to. Substantially the answer put in issue only the allegation that the amount of his pension was illegally fixed. On the trial of the action neither party offered evidence. The trial court held that the burden of proof was on the defendant to show that the plaintiff's pension could be fixed at a less sum than \$800, half of his previous salary, and in default of that evidence awarded judgment to the plaintiff. This judgment has been affirmed in the Appellate Division by a divided court.

Section 790 of the charter provides: "The fire commissioner shall have power to retire from all service in the said fire department, or to relieve from service at fires, any officer or member of the uniformed force of said department, who may, upon an examination by the medical officers, ordered by the said fire commissioner, be found to be disqualified, physically or mentally, for the performance of his duties; and the said officer or member so retired from service shall receive from said relief fund an annual allowance as pension in case of total disqualification for service, or as compensation for limited service in case of partial disability; in every case, the said fire commissioner is to determine the circumstances thereof, and said pension or allowance so allowed is to be in lieu of any salary received by such officer or member at the date of his being so relieved or retired from fire duty in said department, and the said department shall not be held liable for the payment of any claim or demand for services thereafter rendered, and the amount of such pension or allowance shall be determined upon the following conditions: In case of total permanent disability, at any time, caused in or induced by the actual performance of the duties of his position, or which may occur after ten years' active and continuous service in the said fire

department, the amount of annual pension to be allowed shall be one-half of the annual compensation allowed such officer or member as salary at the date of his retirement from the service, or such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant." Under these provisions the relator's pension should have been one-half his previous salary unless the condition of the pension fund warranted only the allowance of a smaller sum. A majority of the learned Appellate Division was of opinion that the provision for a smaller pension than half salary was in the nature of an exception or proviso, the negative of which the plaintiff was not obliged to plead nor prove, but which rested upon the defendant to affirmatively establish, and that in default of proof to that effect on the defendant's part the plaintiff was entitled to recover. There is much technical learning on the subject of exceptions and provisos in their relations to both pleading and proof into which we do not deem it necessary to enter. The complaint alleges that the order of retirement fixed his pension at the sum which he has received. The presumption is that a public officer has done his duty, and where it is claimed that the duty has been violated the burden of proof is on the party alleging such fact to prove it. (*Leland v. Cameron*, 31 N. Y. 115; *Wood v. Morehouse*, 45 N. Y. 368; *People ex rel. Manhattan Ry. Co. v. Barker*, 146 N. Y. 304) There is, however, as pointed out by the judges who dissented in the Appellate Division, a further objection to the plaintiff's recovery, which goes to the right to maintain the action. It is obvious, both by the language of the statute itself and the necessity of the case, that when the fire commissioner retires a member of the fire department he is to determine the amount of the pension on which the member is retired. "In every case the said fire commissioner is to determine the circumstances thereof, and said pension or allowance so allowed is to be in lieu of any salary received by such officer or member," etc. This action is at law to recover arrears of pension, and a determination by the fire commissioner awarding the plaintiff some sum

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was a condition precedent to the maintenance of an action. It is true that under the statute the commissioner had no arbitrary power to award the plaintiff such compensation as he saw fit, but was required to allow him half pay unless the relief fund was inadequate to sustain that burden. Nevertheless, it was the commissioner that in the first instance was to make the determination, and if he erred in that determination the plaintiff's remedy was by a direct proceeding to compel the commissioner to make a right determination. We do not say that the determination of the commissioner was a judicial one to be reviewed only by certiorari; on the contrary, it was administrative, the proper discharge of which could be enforced by mandamus. But until corrected by mandamus the determination must stand and conclude both parties, plaintiff and defendant. Any other rule would involve the administration of the relief fund in great confusion. Suits might be brought at any time by retiring members of the force on the claim that the retiring pension had been fixed too low. Possibly the only effect of the Statute of Limitations would be to cut off claims arising more than six years before the commencement of the action. It is apparent that in determining the amount of a pension the condition of the relief fund must be considered with reference to all other pensions charged against it which at the time are outstanding. If years after retirement the pensions of retired members are to be increased by favorable verdicts and decisions in actions of the character of the one before us, it is obvious that either the pensions awarded other retired members may be affected or that the fund itself may be depleted and rendered insufficient to defray the charges upon it. The incumbent of the office of fire commissioner, who is apt to be changed after a short term of service, could not well know whether he should accede to or reject claims for pensions which may have been fixed by his predecessors in office. It would be practically impossible at any particular time to determine what was the real condition of the relief fund and the legal charges thereon. All this confusion can be avoided and the rights of

the members of the department entirely protected by requiring any member aggrieved by the action of the fire commissioner in determining his pension to correct that determination by a direct proceeding.

The judgments of the Appellate Division and the Trial Term should be reversed and the complaint dismissed, without costs, however, in any court.

GRAY, VANN, WERNER, HISCOCK and CHASE, JJ., concur; EDWARD T. BARTLETT, J., dissents on the ground the burden of proof is on the fire commissioner.

Judgment accordingly.

SILAS T. SWAN, Respondent, *v.* EDWARD C. INDERLIED,
Appellant.

1. LANDLORD AND TENANT — ASSIGNMENT OF RENT ACCRUING SUBSEQUENT TO EXTENSION OF TERM. In an action by the grantee of leased premises to recover rent, it appeared that the lease was for a year, with the privilege to the defendant "to extend it for a further term of one or two years upon the same terms and conditions;" that the landlord had assigned the rents accruing thereunder to a creditor, to the extent of the sum in which he was indebted; that prior to the expiration of the term and before the defendant had notified the landlord of his intention to extend it, the latter conveyed the premises to the plaintiff, who had knowledge of the assignment; that thereafter the defendant extended the term; that the rents accruing prior to the extended term being insufficient to satisfy the claims of the assignee, the defendant paid him the rent for two months thereof, which the plaintiff seeks to recover. *Held*, that the defendant's liability to pay rent accrued under the original letting, and not by virtue of any new agreement, express or implied, and the rent sued for passed by the assignment.

2. APPEAL — WHEN CERTIFIED QUESTION CANNOT BE ANSWERED. The Court of Appeals cannot answer a question certified to it by the Appellate Division upon an appeal from a judgment of that court affirming a judgment of a County Court, which affirmed a judgment of a City Court, in the absence of a provision for the certification of questions upon the allowance of an appeal of such a character.

Swan v. Inderlied, 101 App. Div. 612, reversed.

(Argued December 21, 1906; decided February 19, 1907.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 9, 1905, affirming a judgment of the Broome County Court, which affirmed a judgment in favor of plaintiff entered upon a judgment of the City Court of Binghamton.

The nature of the action and the facts, so far as material, and the question certified, are stated in the opinion.

Harvey D. Hinman for appellant. The assignment of the lease by the lessor, while he was the owner of the demised premises, separated the rents from the reversion and passed to the assignee the benefit of the covenant to pay rent, so that the plaintiff under his subsequent deed took only the reversion which should remain after the payment of the rent and after the expiration of the lease. (*Demarest v. Willard*, 8 Cow. 206; *Bennett v. Austin*, 81 N. Y. 309; *Van Wicklen v. Paulson*, 14 Barb. 654; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Huerstel v. Lorillard*, 6 Robt. 260; 1 McAdam on Landl. & Ten. [3d ed.] 790; *Moffatt v. Smith*, 4 N. Y. 126; *Childs v. Clark*, 3 Barb. Ch. 52; *Willard v. Tillman*, 19 Wend. 358; *Pigott v. Mason*, 1 Paige, 412; *Tracy v. A. E. Co.*, 7 N. Y. 472.) The defendant's election to extend the term of the lease did not constitute a new contract between the defendant and the plaintiff, who had become the owner of the reversion. (*Pugsley v. Aiken*, 11 N. Y. 494; *House v. Burr*, 24 Barb. 525; *Chretien v. Doney*, 1 N. Y. 419; *Hausauer v. Dahlman*, 72 Hun, 607; *Voegel v. Ronalds*, 83 Hun, 114; *Kelly v. Varnes*, 52 App. Div. 100; *Decker v. Gaylord*, 8 Hun, 110.)

Charles H. Hitchcock for respondent. The lease in question must be construed as a lease for one year, with an option or covenant for a renewal. (1 McAdam on Landl. & Ten. 552.) There is implied in a covenant for renewal that, at or before the termination of the old, a new bargain is to be made. (21 Am. & Eng. Ency. of Law [2d ed.], 923.) The right to rentals under a possible renewal being non-existent at

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the time of the transfer, could not pass under it. (1 Benj. on Sales, § 92; *Low v. Pew*, 108 Mass. 314; *Deeley v. Dwight*, 132 N. Y. 59.)

CULLEN, Ch. J. As the Appellate Division deemed the question involved in this case so important as to require this court to pass thereon, it is to be regretted that the learned court did not favor both the parties and this court with its own views on the subject. There has not a word been written in this case by any of the courts below, and the question certified is whether, on the facts stipulated by the parties, the plaintiff should have recovered. The particular point, therefore, as to which our opinion is desired can be gleaned only from the record and the briefs of counsel.

On April 11th, 1902, Carey Worden, the owner of certain premises in the city of Binghamton, leased them by a written agreement, "for the term of one year, to commence on the 1st day of May, 1902, and to end on the 30th day of April, 1903." The lease contained this further provision: "It is also further understood and agreed that the said party of the second part has the privilege to extend this lease for a further term of one or two years upon the same terms and conditions." On October 7th, 1902, the lessor, by an instrument in writing, assigned to D. M. Worden the rents and money to accrue under said lease to the extent of the sum in which he was indebted to him. On March 23rd, 1903, and before the defendant had notified the lessor of his intention to extend the term, said lessor conveyed the premises to the present plaintiff, who had knowledge of the assignment of the rents to Worden. The rents accruing prior to May 1st, 1903, were insufficient to satisfy D. M. Worden's claim, and the defendant paid the rent for the months of May and June, 1903, to said assignee. Thereupon the plaintiff sued the defendant for the same rent. It is conceded that it was within the power of the lessor to separate the rent that was to accrue under the lease from his reversion in the premises and assign such rent to Worden. (*Demarest v. Willard*, 8 Cow. 206;

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Bennett v. Austin, 81 N. Y. 308.) The plaintiff's recovery has proceeded on the theory that the rent sued for did not accrue under the lease of May 1st, 1902; that the extension of the demised term under the privilege reserved in the lease was merely the exercise of an option by the lessee to obtain a new lease, and that the chance of rent accruing after the expiration of the original term was a mere potentiality on which the assignment of the lessor to Worden could not operate. We are of opinion that defendant held the premises after May 1st, 1903, not by virtue of any new agreement, express or implied, but under the original letting. The provision of the lease is not that the tenant may require a new lease from the landlord, but that he may extend the original lease for an additional term of one or two years. In other words, the demised term was for one, two or three years as the tenant might elect. We do not think the case can be distinguished in principle from several found in the books. In *Chretien v. Doney* (1 N. Y. 419) the lease was for one year and the lessee was "To have the premises for one year, one month and twenty days longer, but if he leaves he is to give four months notice before the expiration of the lease." It was held that the lease created a term for the full period of two years, one month and twenty days, defeasible at the election of the tenant after one year upon giving four months' notice. In *Pugsley v. Aikin* (11 N. Y. 494) the lease was for the term of one year and an indefinite period thereafter. It was held that so long as the tenant remained in possession of the premises his liability to pay rent accrued under the original letting and not by any implied new lease. In *House v. Burr* (24 Barb. 525) the lease was for a specified term, "with the privilege of two years more, if desired," upon giving notice. It was held that the notice effected an extension of the demised term under the lease. In *Voegel v. Ronalds* (83 Hun, 114) the lease contained a provision, "It is further agreed by the party of the first part to extend the above lease for a term of two additional years at the same yearly rental if the party of the second part so desires." It was held that "When there

is a lease for a definite term, with a privilege of an additional term at the tenant's option, it operates as a lease for the continuous term if the tenant so elects." In *Kramer v. Cook* (73 Mass. 550) the lease was for a term of three years, and "at the election of said Cook for the further term of two years next after said term of three years." It was held that the provision in the lease was not a mere covenant for renewal, but was as to the additional term a lease *de futuro*, requiring only a lapse of the preceding term and the election of the tenant to become a lease *in presenti*.

We are of the opinion that the rent subsequent to May, 1903, accrued under the original letting and passed by the assignment to the assignee. It is unnecessary, therefore, to consider whether, if the covenant in the lease had been strictly for a renewal instead of an extension of the demised term, a different result would have been reached. (See *Witmark v. N. Y. El. R. R. Co.*, 76 Hun, 302; *affd.*, 149 N. Y. 393, and *Storms v. Manh. Ry. Co.*, 178 N. Y. 493.)

The judgments of all the courts below should be reversed and the complaint dismissed, with costs in all courts. The question certified is not answered, as there is no provision for the certifying of questions upon the allowance of an appeal of the character of the one before us.

GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HIS-
COCK, JJ., concur; CHASE, J., not sitting.

Judgments reversed, etc.

MARY A. GRAY, as Administratrix of the Estate of BERNARD
GRAY, Deceased. Appellant, v. SIEGEL-COOPER COMPANY,
Respondent.

NEGLIGENCE — DEATH CAUSED BY FALLING FROM ELEVATOR — ERRO-
NEOUS NONSUIT. The facts examined in an action to recover for the
death of plaintiff's intestate, who was killed while delivering goods to
the defendant in its department store by falling from an elevator through
a space between it and the wall, and *held*, that a nonsuit was erroneously
granted where, considering both the evidence received and that improperly

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excluded, questions of fact were presented as to whether decedent could or ought to have seen the opening, and whether the defendant was negligent in maintaining the elevator with a space large enough for a man to fall through and in permitting it to be used by persons delivering freight.

Gray v. Siegel-Cooper Co., 111 App. Div. 926, reversed.

(Argued January 31, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John J. Robinson for appellant. Defendant owed plaintiff's intestate the duty of exercising reasonable care to render the elevator and shaft and their surroundings reasonably safe for his use. (*Beck v. Carter*, 68 N. Y. 292; *Thompson on Neg.* § 968; *Ray on Neg.* 119; *Erickson v. S. P. & D. R. Co.*, 41 Minn. 500.) The question of defendant's negligence should have been submitted to the jury. (*Eastland v. Clark*, 16 N. Y. 420; *Hart v. H. R. B. Co.*, 80 N. Y. 622; *Hayes v. Miller*, 70 N. Y. 116; *Barrett v. L. O. B. I. Co.*, 174 N. Y. 316; *Donnelly v. City of Rochester*, 166 N. Y. 318; *Cleveland v. N. J. S. Co.*, 125 N. Y. 306.) The question of Gray's freedom from contributory negligence should have been submitted to the jury. (S. & R. on Neg. [4th ed.] § 92; *Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383; *Hart v. H. R. B. Co.*, 80 N. Y. 622; *Woodworth v. N. Y. C. R. R. Co.*, 55 App. Div. 23; *Irish v. U. B. & P. Co.*, 103 App. Div. 45; *Hayes v. Miller*, 70 N. Y. 116; *Thurber v. H. R. Co.*, 60 N. Y. 330; *Eastland v. Clark*, 165 N. Y. 420.)

Roger B. Wood, George Gordon Battle and Frederick C. Fishel for respondent. The defendant owed no duty to the plaintiff except to abstain from willful or malicious injury. (*Victory v. Baker*, 67 N. Y. 366; *Flanigan v. A. G. Co.*,

3 N. Y. S. R. 867; *Castoriano v. Miller*, 15 Misc. Rep. 254; *Flanagan v. A. A. A. Co.*, 37 App. Div. 476; *Miller v. Brewster*, 32 App. Div. 559; *South Bend Iron Works v. Larger*, 11 Ind. App. 367; *Leverly v. Nickerson*, 120 Mass. 306; *Billows v. Moors*, 162 Mass. 42; *McCarthy v. Foster*, 156 Mass. 511; *Zoebisich v. Tarbell*, 10 Allen, 385.) Even assuming the existence of any duty to the deceased, the plaintiff failed to show negligence on the part of the defendant. (*Dougan v. C. T. Co.*, 56 N. Y. 1; *Crocheron v. N. S. S. I. F. Co.*, 56 N. Y. 656; *Loftus v. U. F. Co.*, 84 N. Y. 455; *Lafflin v. B. & S. W. Ry. Co.*, 106 N. Y. 136; *Ryan v. M. Ry. Co.*, 121 N. Y. 126; *Frobisher v. F. A. T. Co.*, 151 N. Y. 431; *Gabriel v. L. I. R. R. Co.*, 54 App. Div. 41; *Race v. U. F. Co.*, 138 N. Y. 644.) The plaintiff failed to show freedom from contributory negligence; or, at best, the circumstances pointed as much to the negligence of the deceased as to its absence, or pointed in neither direction. (*Rudolph v. Montant*, 37 App. Div. 396; *Wieland v. D. & H. C. Co.*, 167 N. Y. 19; *Whalen v. C. G. Co.*, 151 N. Y. 70; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Wiwirowski v. L. S., etc., R. R. Co.*, 124 N. Y. 420; *Neddo v. Vil. of Ticonderoga*, 77 Hun, 524; *Stephenson v. E. G. L. Co.*, 60 Hun, 77; *Weston v. City of Troy*, 139 N. Y. 281.)

HAIGHT, J. This action was brought to recover damages by reason of the death of the plaintiff's intestate, which it is alleged was caused by the negligence of the defendant.

Gray was in the employ of Schwartzchild & Sulzberger, butchers, and had been directed to deliver a load of meat ordered by the defendant at its department store on Sixth avenue in the city of New York. He drove to the freight elevator on the southeast corner of the building and went up to the fourth floor where the meat was to be delivered, presumably for the purpose of giving notice that he had meat below to deliver, and then returned by the elevator to the ground floor. He was shortly followed by two employees of the defendant who assisted him in unloading the meat and placing

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it in the elevator, and after they had done so the three got aboard of the elevator and were taken to the fourth floor where it was stopped to discharge the meat. It appears that the entrance to the elevator at the ground floor was from the outside through the wall; that the entrance or exit from the elevator car on the floors above was from the opposite side directly into the rooms in the building; that the wall of the building receded from the elevator shaft, by reason of the fact that it was not maintained of the same thickness up to the top of the building, but was lightened by constructing the wall thinner as it progressed upwards from story to story; the shaft was seven stories high and covered at the top with a skylight, and at the place where the elevator stopped at the fourth floor there was a space in the rear of the platform between it and the wall of the building of from ten and one-half to eighteen inches, as appears from the conflicting testimony upon that subject. There was also some conflict in the testimony of the witnesses as to whether the light in the elevator car was sufficient so that the opening between the platform and the wall of the building could be readily seen. The elevator was supplied with a rack or rail overhead in a U shape, upon which the meat was hung, and on the ceiling of the fourth floor there was a rail corresponding with that in the elevator car, by which they could shove the meat hanging upon the rail in the car back through the room to a place where it was weighed and receipted for. The elevator was operated by a man employed for that purpose. After the elevator stopped at the fourth floor, Gray assisted the others in shoving the meat out of the elevator car, and while so engaged he stepped backward off from the platform of the car through the hole between it and the wall, and fell down through the elevator shaft and was killed.

Gray was a stranger, making his first delivery of meat to the defendant. All of the knowledge that he appears to have had with reference to the elevator was that which he derived from his trip up to give notice of the arrival of the meat. The question as to whether he could see or ought to have

seen the open space between the car and the wall at the fourth floor depended to some extent upon the amount of light at that place. Some of the witnesses described it as very dull, while others thought it was quite bright. We think the question as to whether he saw or ought to have seen the open space was a question of fact for the jury. As to other conflict between the witnesses with reference to the breadth of the space between the car and the wall, we have the conceded fact admitted by all of the witnesses who were present that it was large enough for this man to fall through, and he appears to have been of the height of about five feet eight inches, weighing one hundred and fifty-six pounds. The question is, therefore, presented as to whether the defendant was negligent in maintaining this elevator in such a condition. The contention of the defendant is that the elevator was maintained for freight only, and that such a notice was posted over the door and that it was not intended for passengers. It appears, however, that the elevator was operated by a man in the employ of the defendant; that he took Gray up on his arrival with the meat, brought him back and operated the elevator when he took the meat and the workmen up. It further appears that there was some evidence given and more offered tending to show that for a long time before it had been customary for those delivering freight upon the fourth floor of the building to use this elevator in taking the freight up and delivering it without objection on the part of the defendant or those in charge of the elevator, that it was not intended for such purpose; but this evidence, so far as taken, was stricken out by the court upon the motion of the defendant's counsel and that which was offered was ruled out as incompetent and not material. We think it was quite material as bearing upon the negligence of the defendant. If the defendant had maintained this elevator for years for the purpose of carrying passengers or those who were engaged in delivering goods upon the different floors of this store, leaving an open and unprotected space between the platform and the wall through which passengers might fall, it would tend to show to a certain

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extent that it was negligent on this occasion in permitting the decedent to enter the elevator car by the person in charge without calling his attention to the dangerous opening on the floor upon which he was to transact his business. It is true that it did not distinctly appear that Gray knew of the custom which the plaintiff sought to prove, and yet he was a stranger, making his first delivery of goods, and he must have been advised, to some extent, of the way in which goods had been delivered before, for he drove his wagon to this elevator, then went to the fourth floor to give notice, and again ascended with the meat and the employees who had helped him to remove the meat to the elevator car, presumably to attend to the weighing of the meat and getting his receipt therefor at the place where it was delivered. Exceptions were taken by the plaintiff's counsel to the exclusion and the striking out of this evidence. We think the court erred in excluding it, and that in determining the question as to whether a nonsuit was warranted it should be treated as evidence in the case.

Again, immediately after Gray had fallen down the elevator shaft, a policeman upon the beat was called, and he, finding that Gray was already dead, had the body sent to his police station. He then, within twenty minutes after the finding of the body, as he tells us, made an examination of the elevator car at the fourth floor; found the light dull, and the space between the platform and the wall, as near as he could estimate, eighteen inches in breadth, and that the floor of the elevator was greasy. Objection was made to this and the court struck it out, and the plaintiff took an exception. Afterwards, the defendant, was permitted to prove by its witnesses that the floor was not greasy. We think the testimony of the policeman was competent. It is true he was not speaking of the precise moment that the decedent fell from the car, but it was within a very few minutes thereafter. It was as soon as he could arrange to have the body taken to the station house, within twenty minutes or half an hour. It was not claimed that the condition of the floor had in the meantime been changed. It was not so remote from the time of the accident as to make it

immaterial or incompetent. We think this evidence may also be considered upon the question as to whether there should have been a nonsuit. The question as to whether the floor was greasy and as to whether it was dark in the elevator car, or the light dull, bears upon the question of the contributory negligence of the decedent, and the evidence with reference to the maintaining of the elevator by the defendant for the use of persons delivering freight or goods upon the different floors of the store bore upon the question of defendant's negligence in maintaining it in the condition in which it was on this occasion. We think the evidence presented a question of fact for the jury, and that the nonsuit was erroneously granted.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment reversed, etc.

DOMENICO RENDE, as Administrator of the Estate of GIUSEPPE RENDE, Deceased, Respondent, v. NEW YORK AND TEXAS STEAMSHIP COMPANY, Appellant.

1. NEGLIGENCE — LIABILITY OF MASTER. Mere proof that an accident has happened is not evidence of a master's negligence; he is not an insurer and is only liable for the exercise of reasonable care and prudence.

2. INSUFFICIENT PROOF OF NEGLIGENCE. Where the only issue is whether a master has failed to perform his legal duty to provide for his servant a reasonably safe and proper place to work, evidence that the servant was killed by the fall of an iron shutter upon one of the master's vessels, is not sufficient to establish the master's liability for damages, in the absence of proof of some affirmative act or omission constituting negligence on the part of the master, and showing that the servant was free from contributory negligence.

Rende v. N. Y. & Texas Steamship Co., 112 App. Div. 922, reversed.

(Argued January 30, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

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Points of counsel.

April 26, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank V. Johnson for appellant. If there was any negligence in the fastening or securing of the door in question, as charged in the complaint, it was negligence in respect to the performance of a detail of the work, for which the defendant is not responsible. (*Laughlin v. State of New York*, 105 N. Y. 159; *Hudson v. O. S. S. Co.*, 110 N. Y. 625; *Hussey v. Coger*, 112 N. Y. 614; *Hogan v. Smith*, 125 N. Y. 774; *McCampbell v. C. S. S. Co.*, 144 N. Y. 552; *Perry v. Rodgers*, 157 N. Y. 251; *Quigley v. Levering*, 167 N. Y. 58; *Madigan v. O. S. N. Co.*, 178 N. Y. 242; *Vogel v. A. B. Co.*, 180 N. Y. 373; *Ludlow v. G. B. Mfg. Co.*, 11 App. Div. 452.) The plaintiff failed to offer any evidence tending to establish freedom from contributory negligence on the part of the deceased, while there is affirmative proof to the effect that the accident was occasioned by his own negligent act. (*Whalen v. C. G. Co.*, 151 N. Y. 70; *Weston v. City of Troy*, 139 N. Y. 281; *Wieland v. D. & H. C. Co.*, 167 N. Y. 19; *Perez v. Sandowitz*, 180 N. Y. 397.)

Nelson L. Keach and *Achille J. Oishei* for respondent. The defendant was bound to furnish the deceased with a safe and proper passageway to go from the steamer to the barge in order to perform his work, and the failure in this regard was negligence for which the defendant was liable. That duty could not be delegated to any fellow-servant so as to relieve the master from liability. (*Chevers v. O. S. S. Co.*, 26 Misc. Rep. 193; *Lentino v. P. H. I. O. Co.*, 71 App. Div. 466; *Cunningham v. S. A. P. Co.*, 49 App. Div. 300; *Crispin v. Babbitt*, 81 N. Y. 521; *McLaughlin v. Eidlitz*, 50 App. Div. 522; *Scandell v. C. C. Co.*, 50 App. Div. 513; *Kiras v. N. C. Co.*, 59 App. Div. 79; *Butler v. Townsend*,

126 N. Y. 110.) The evidence discloses sufficient freedom from contributory negligence on the part of the deceased. (*Kain v. Smith*, 89 N. Y. 375; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 38; *Kiras v. N. C. Co.*, 59 App. Div. 79.)

WERNER, J. The defendant is a corporation which owns and operates a fleet of ocean-going steamships, and the plaintiff's intestate was one of a gang of men who had been for a number of years employed by the defendant in the coaling of its ships.

On the 13th day of December, 1902, one of the defendant's steamships called the "Neuces" was taking on coal from a canal boat moored alongside at the foot of pier twenty in the East river. On the side of the ship toward the canal barge there were several port holes, one of which was used by the men employed in the transfer of the coal as a passageway between the two vessels. This port hole was a nearly square aperture about twenty by twenty-four inches in size, which, when closed, was covered by an iron shutter weighing about one hundred and twenty pounds and hung from hinges at the top. On the morning in question the deceased had been working on the inside of the ship for about an hour and a half when he was directed by the foreman to go over to the barge where some of the men were missing. When he had finished the work which he had been directed there to do he started to return to the ship through the port hole which he had used in leaving it. According to the evidence of a fellow-workman, the deceased had supported himself by his hands in such fashion as to swing his feet and the lower part of his body into the port hole, leaving his head and shoulders still on the outside, when the iron shutter came down with such force as to fracture his skull, from the effects of which he died.

This action was brought to recover damages for his death, and the plaintiff's side of the case proceeded upon the theory that this port hole was a part of the place in and about which the deceased was required to perform his work, and which it

was the master's duty to keep as safe as possible by the exercise of reasonable care and diligence. As bearing upon the defendant's alleged negligence in this regard, the plaintiff's evidence tended to show that the door or shutter was open when the deceased attempted to go through the port hole; that there was nothing attached to it; and that it was not fastened in any way. The defense took the ground that even if the door or shutter had been wide open and unfastened, the alleged fault or neglect in this behalf related to a mere detail of the work for which the defendant was not responsible. Evidence was adduced in support of this latter aspect of the case, but that need not be referred to since our consideration of the questions involved is circumscribed by the rule that the plaintiff is entitled to the benefit of all the most favorable inferences deducible from the testimony of his own witnesses.

Looking at the case from that angle and assuming for the moment that the only question it presents is, whether the master failed in its duty to provide its servant with a reasonably safe and proper place in which to work, we can find in the record no evidence from which it can be inferred with anything like approximate certainty that the defendant was guilty of any negligence. This heavy shutter was open, it is true, and was not fastened by rope or otherwise. It fell upon the deceased and caused his death. We are not informed as to the cause of its fall; neither do we know whether its position and condition were such as to charge the master with notice that if left unfastened its fall would be imminent. Whether a shutter, operated as this one was, would have a tendency to remain open or to fall and close, would seem to depend entirely upon the simple law of gravity. It might be placed so that, if left unfastened, its fall would be anticipated by observing and intelligent men. On the other hand, it might be thrown back so far as to render its fall impossible unless, by a violent disturbance of the water or otherwise, the ship were thrown so far over on her side as to change the center of gravity. In the one case there would be the obvi-

ous necessity for some kind of a fastening; and in the other it might not be suggested even to the most prudent of men. In such a situation, mere proof that an accident has happened is not evidence of a master's negligence, for he is not an insurer and is only liable for the exercise of reasonable care and prudence.

What has been said upon the question whether there was proof of the defendant's negligence is, in one respect, quite as pertinent to the issue of the intestate's freedom from contributory negligence. If the position of the shutter was such as to suggest no possibility of its falling, then there could of course be no inference of contributory negligence against the intestate from his use of the port hole as a passageway. If, however, its position clearly indicated that it would fall if not fastened, then the intestate was negligent in going through the port hole without taking some precaution to keep the shutter in its place. The evidence upon this feature of the case, although very meagre, is against the plaintiff, for his witnesses testified that the door and its lack of fastening were plainly visible from the barge. It was while the deceased was returning from the barge to the ship that he met with this accident, and as he was not an itinerant stevedore but a regular employee of the defendant, the presumption is that he was familiar with the construction of the ship and saw the position and condition of the shutter. If he took the chance of going through a place that was obviously dangerous he was guilty of contributory negligence, and this would bar the plaintiff's recovery even if the defendant's negligence had been established or were conceded.

While a decision adverse to the plaintiff upon either of the two questions we have discussed must necessarily result in a reversal of the judgment recovered by him and affirmed by the Appellate Division, the plaintiff is yet entitled to a new trial and if he elects to take it he may possibly strengthen his case, but he will still be confronted by the question whether the failure to properly fasten this shutter was the neglect of a duty which rested upon the master or whether it was merely

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a detail of the work involving the negligence of some one who stood in the relation of a fellow-servant to the intestate. In view of the paucity of the evidence in the record before us it is impossible to decide that question upon this appeal. Viewing it in the light of the rule that the master's duty and responsibility are determined by the character of the act upon the commission or omission of which the charge of negligence is predicated, rather than upon the grade or title of a particular employee through whose immediate default an injury befalls one of his co-employees, all that we can now properly say is that the fastening of an ordinary door or shutter, so that it will not fall or swing, would seem to be a detail which the master may delegate to a subordinate. This is a broad generalization, but no more definite statement can be made upon the nebulous evidence before us. Conceding all that the learned counsel for the respondent argues as to the distinction between the rule relating to the master's duty to provide a safe place for his servants and the less rigid rule governing his duty to furnish tools and appliances, the fact remains that there is nothing in the evidence to show that there was anything in the character or condition of the place where the deceased was at work or in the use to which it was put to indicate that the defendant had failed in the performance of any duty to its employees that ordinary prudence and care could have suggested to any master similarly situated. If this shutter was anything more or different than any iron door swinging upward and downward and required some special kind of fastening which could not be safely intrusted to those having occasion to use it, that fact was not shown.

The judgment herein should be reversed and a new trial had, with costs to abide the event.

CULLEN, Ch. J., HAIGHT and CHASE, JJ., concur; GRAY, VANN and WILLARD BARTLETT, JJ., concur in result.

Judgment reversed, etc.

EMANUEL A. BUSCH, Respondent, v. INTERBOROUGH RAPID
TRANSIT COMPANY, Appellant.

COMMON CARRIERS—ACTION FOR ASSAULT UPON PASSENGER BY EMPLOYEES OF STREET RAILWAY COMPANY—WHEN ALLEGATIONS OF COMPLAINT THEREIN CONSTITUTE CAUSE OF ACTION FOR BREACH OF DEFENDANT'S CONTRACT TO CARRY PASSENGER SAFELY. Where it is alleged, in an action brought against a street railway company, that the plaintiff became a passenger of the defendant for the purpose of being carried upon one of its cars; that, in consideration of the required fare duly paid by the plaintiff, the defendant agreed to carry him safely and treat him properly, and that, in violation of such contract, the defendant, through its agents and employees, wrongfully and illegally maltreated and assaulted the plaintiff, the complaint states facts which constitute a cause of action for a breach of a contract between the defendant and the plaintiff, and not a cause of action for a tort, and it is no bar or answer to such cause of action that an action for tort might have been, and ordinarily would be, brought for the acts of which the plaintiff complained; the Municipal Court of the city of New York has, therefore, jurisdiction of the action; and where a judgment for plaintiff, entered upon the verdict of a jury, has been unanimously affirmed by the Appellate Division, it must be assumed that there was evidence to support the verdict, and, in the absence of some objection thereto, it also may be presumed that such evidence was in accordance with, and in support of, the allegations of the complaint.

Busch v. Interborough Rapid Transit Co., 110 App. Div. 705, affirmed.

(Argued January 15, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 6, 1906, upon an order reversing a determination of the Appellate Term which reversed a judgment in favor of plaintiff entered upon a decision of the Municipal Court of the city of New York.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph H. Adams, Charles A. Gardiner, J. Osgood Nichols, Alfred E. Mudge and Theodore L. Waugh for appellant. This is an action to recover damages for personal injuries arising from an alleged willful assault and false imprisonment,

and is one of which the Municipal Court is expressly denied jurisdiction. (*Hunt v. Hunt*, 72 N. Y. 217; *Cooper v. Reynolds*, 10 Wall. 308; *Hughes v. Cuming*, 165 N. Y. 91; *Grover v. Gould*, 20 Wend. 227; *Wade v. Kalbfleisch*, 57 N. Y. 282.) This is an action to recover damages for willful tortious personal injury, an assault and battery. (*Priest v. H. R. R. Co.*, 65 N. Y. 589; *Feeney v. B. C. Ry. Co.*, 36 Hun, 197; *Stewart v. B. & C. R. R. Co.*, 90 N. Y. 588; *Webber v. H., etc., R. R. Co.*, 109 N. Y. 311.) Such an action cannot be both in tort and contract, nor can its nature be divided, limited or changed. (*Austin v. Ruwdon*, 44 N. Y. 71; *Ross v. Mather*, 51 N. Y. 108; *Burnham v. Walkup*, 54 N. Y. 656; *Truesdell v. Bourke*, 145 N. Y. 612; *Wilson v. H. L. S. Co.*, 153 U. S. 39; *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382; *Matthews v. Cady*, 61 N. Y. 651; *Dulley v. Scranton*, 57 N. Y. 424; *Lockwood v. Quackenbush*, 83 N. Y. 607.)

Charles Goldzier for respondent. The Municipal Court had jurisdiction of the present action. (*Hart v. M. St. Ry. Co.*, 65 App. Div. 493; *Hines v. M. St. Ry. Co.*, 75 App. Div. 391; *Rein v. B. H. R. R. Co.*, 94 N. Y. Supp. 636; *Gillespie v. B. H. R. R. Co.*, 178 N. Y. 347; *Stewart v. B. & C. I. R. R. Co.*, 90 N. Y. 588; *Eddy v. T. A. R. R. Co.*, 53 N. Y. 25; *Miller v. King*, 166 N. Y. 394; *Rich v. N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 382; *Johnson v. Gerdwood*, 7 Misc. Rep. 651; *Graves v. Waite*, 59 N. Y. 156; *Sparman v. Keim*, 83 N. Y. 245.)

Hiscock, J. This action was brought to recover damages for defendant's failure to properly transport plaintiff over its road in the city of New York. The real, substantial element of damages is an alleged assault upon and maltreatment of plaintiff by one of defendant's employees after the former had passed through the gateway on to the platform of one of defendant's stations for the purpose of taking a train, and the sole question is whether the action is one of contract or of

tort. This inquiry is of controlling importance, since the Municipal Court where the cause originated had jurisdiction of an action of the former character and did not have jurisdiction of one of the latter kind.

I think that the learned Appellate Division correctly held that the action was one in contract and that plaintiff's judgment should be affirmed.

Naturally the first and most important step to be taken in determining this question is an examination of the complaint. The allegations of this which are important read as follows: "*Second.* That on the 7th day of January, 1905, this plaintiff became a passenger of the defendant for the purpose of being carried upon one of its cars * * * and in consideration of the sum of five cents (5c.) duly paid by this plaintiff to the defendant, the defendant promised and agreed safely to carry this plaintiff and to treat him properly and carefully.

"*Third.* * * * That the defendant through its agents and employees, wrongfully, illegally and in violation of the terms of said contract, assaulted the plaintiff," etc.

The trial proceeded under this complaint, and evidence was produced which, without recapitulating it, is assumed upon this appeal to have been in accordance with and in support of the allegations of the complaint. In the presence of a unanimous affirmance we must assume that there was evidence to support the verdict and, in the absence of some objection, we may presume that such evidence followed the pleadings.

Therefore we have the allegations established by proof of a promise and agreement to do certain things, of the violation of the "terms of said contract," and of the manner in which the violation occurred. These allegations, in so far as they affect the point under consideration, are not modified or supplanted by any others, and I fail to see how a complaint could much more directly impress upon an action the character of one in contract than does the pleading before us. It certainly was possible for the defendant to make a contract "safely to carry this plaintiff and to treat him properly and carefully," and we must accept the allegation that it did so. Having

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done this it was possible for it to commit a "violation of the terms of said contract," and this is properly alleged. And finally there is no room for doubt or need for authorities that all or some of the wrongful acts of defendant's servant which are alleged as constituting such violation did in fact amount to a breach of the alleged specific contract "to safely carry" plaintiff and to "treat him properly and safely." Nothing more occurs to the mind in the way of allegations which was necessary to establish the character of the action as one for contract which had been broken to plaintiff's damage.

Probably little or no doubt would have arisen as to the form of the complaint or the nature of the action if there had been alleged and proved some act constituting a familiar breach of contract; but the fact that this action was brought to recover damages largely caused by acts ordinarily treated as torts has cast a suspicion upon its character which, however natural, is not confirmed by legal analysis.

It is no bar or answer to the claim of an action in contract that one in tort might have been, and ordinarily would be, brought for the acts really complained of. The dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with a contract, and frequently the same facts will sustain either class of action. (*Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, 390.)

And so while it may be conceded that, independent of any express promise or agreement, the defendant would have been subject to duties and obligations in favor of plaintiff, the violation of which by the acts complained of in this case would have amounted to a tort, that is not at all decisive that this action was not and could not be brought in contract.

Independent of what seems to be the plain logic of the case, the question before us appears to be fairly well settled by authority.

Thompson on Negligence (Sect. 3186) says: "A carrier is liable absolutely as an insurer for the protection of a passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment en route. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out."

Hart v. Metr. St. Ry. Co. (65 App. Div. 493) was brought in Municipal Court to recover damages directly caused by an assault by one of defendant's employees. The argument was made as here that the court was without jurisdiction because the action was for assault. The pleadings were oral and not of assistance in determining the question, so that resort was had to the proofs. Upon these the court held that the action should not be treated as one of assault, but rather as one brought to recover damages for the neglect of the defendant to discharge its obligation as a carrier of passengers.

Hines v. Dry Dock, E. B. & B. R. R. Co. (75 App. Div. 391) also was brought to recover damages resulting from the assault of an employee. The complaint was oral and was "for personal injuries." It was held that the action was not to be regarded as one for assault but rather for breach of contract caused by the misconduct of the defendant's servant.

In *Miller v. King* (84 Hun, 308) damages were sought for the unlawful ejection of plaintiff from one of defendant's cars while he was a passenger, and it was held "that there was a plain breach of contract of which the ticket was evidence."

Stewart v. Brooklyn & C. T. R. R. Co. (90 N. Y. 588) was an action to recover damages by reason of the alleged malicious and unjustifiable assault made upon the plaintiff by one of defendant's employees, and it was said that "by defendant's contract with the plaintiff it had undertaken to carry him

safely and to treat him respectfully;” that the conduct of the employee constituted a breach of the contract; that “it is the defendant’s failure to carry safely and without injury that constitutes the breach, and it is no defense to say that the failure was the result of the willful or malicious act of the servant.”

The case of *Dwinelle v. N. Y. C. & H. R. R. Co.* (120 N. Y. 117) was brought to recover damages which in reality resulted from an assault by one of defendant’s alleged employees. An inspection of the complaint discloses that it was in contract, being expressly based upon the allegations that “defendant contracted and agreed and it became the duty of defendant to safely convey plaintiff,” etc., and that the assault in question was a violation by defendant of “its said contract as common carrier with plaintiff.” While the form of action was not under consideration, still the court took as the basis for its opinion the proposition that the defendant was under “contract obligations” and assumed that the assault was a violation of that contract, provided the defendant was responsible for the acts of the alleged employee who committed it.

Gillespie v. Brooklyn Heights R. R. Co. (178 N. Y. 347) was brought to recover damages for insulting, abusive and wrongful conduct towards plaintiff by one of defendant’s conductors. The complaint was colorless upon the question whether the action was one in contract or for tort, merely setting up the facts relied upon. At the trial court plaintiff was only allowed to recover as the measure of her damages the change which she claimed to be due her. Upon appeal to the Court of Appeals this was held erroneous and she was allowed to recover compensatory damages for humiliation and injury to her feelings. Judge MARTIN, in his carefully considered opinion, assumed and repeatedly in one form or another affirmed the doctrine that plaintiff was entitled to recover either upon the theory of a tort or a breach of contract. He said that the misconduct of the employee was “obviously a breach of the defendant’s contract and of its

duty to its passengers." He quoted with approval Thompson on Negligence to the effect that an unlawful assault upon or an insult to a passenger by the carrier's servant is a violation of its contract, and finally approves by quoting it the rule laid down in Sedgwick on Damages that any person rightfully on the cars of a railroad company is entitled to protection by the carrier and that for any breach of its duty an action may be had either in tort or for breach of the contract.

Many other cases I believe may be cited which are in accord with the doctrine outlined in the above authorities. It is possible that at times the court or the text writer may not have had present in mind the somewhat shadowy distinction sometimes drawn in the case of a common carrier between its contract obligations and its legal duties. It is also true that the learned counsel for the appellant has cited us to one or two authorities seeming to him to establish a contrary doctrine to that here adopted, and has attempted to distinguish the cases above referred to from the one at bar. But considering all that has been called to our attention, it seems to me that the great weight of authority is plainly in favor of the proposition that an action as for a breach of contract may be laid upon the facts alleged and proved in this case, and that the action before us is much stronger for the plaintiff upon this point than most of those referred to because the complaint plainly and completely adopts the form of an action upon contract rather than of tort.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ., concur.

Judgment affirmed.

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Statement of case.

THE LAWYERS' ADVERTISING COMPANY, Respondent, v.
CONSOLIDATED RAILWAY LIGHTING AND REFRIGERATING
COMPANY, Appellant.

CORPORATIONS — LIABILITY OF BUSINESS CORPORATION FOR EXPENSE OF PUBLISHING NOTICES OF SPECIAL ELECTION OF STOCKHOLDERS AND CALLS FOR PROXIES TO BE VOTED THEREAT, UNDER ATTEMPTED AUTHORIZATION OF MAJORITY OF DIRECTORS. Where it appears, in an action brought against a corporation by an advertising company to recover for services and expenses in procuring the publication of four notices relating to a special meeting of the stockholders and to the obtaining of proxies to be voted upon questions in dispute between the president and the majority of the board of directors, that the first publication, giving notice of the special meeting and asking for proxies to be voted thereat, was authorized by a majority of the directors at a meeting thereof, at which the secretary was directed to call the stockholders' meeting and that such authorization was within the scope of the powers and duties of the board of directors, the expense of that publication is a legitimate charge against the corporation for which the plaintiff may recover; but where it appears that the other three notices were not authorized by any lawful resolution or other action of the board of directors at any meeting thereof, but were merely signed by the majority of the directors, and that such notices were merely appeals for proxies to be used by one faction in its contest with the other for the control of the corporation, or a statement by such faction of its side of the controversy, it must be held that the publication of such notices was not, and could not have been, lawfully authorized by the board of directors; and that such notices bore, upon their face, sufficient notice to the plaintiff that they were of a character beyond the limit of anything which could be published in behalf of, or at the expense of, the corporation, so that the plaintiff cannot recover for the publication of such notices. The theory that this was an executed contract of which the corporation had received the benefit and for the expense of which it should pay is not sustained by the facts.

Lawyers' Advertising Co. v. C. R. L. & R. Co., 110 App. Div. 892, modified.

(Argued January 14, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 9, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Francis Woodbridge for appellant. Henry B. Johnson had no apparent or implied authority to contract for the defendant. (*Leary v. A. B. Co.*, 77 App. Div. 6; *Bonyng v. Field*, 81 N. Y. 159; *Packard v. Stephani*, 85 Hun, 197; *Brown v. T. I. Ins. Co.*, 21 App. Div. 42.) No express authority was conferred upon Henry B. Johnson to contract for the defendant. (*P. Bank v. S. A. R. C. Church*, 109 N. Y. 512; *Leary v. A. B. Co.*, 77 App. Div. 6.) These were not proper corporate notices. (*Hull v. E. M. S. Co.*, 2 City Ct. Rep. 69; *Harrison v. F. P. Society*, 46 Conn. 559.)

Gerard Roberts for respondent. The secretary and Mr. Johnson had authority to call the meeting of the stockholders in the method pursued. (*Hoyt v. Thompson*, 19 N. Y. 207.) It is not essential to the validity of the contract that it be evidenced by a formal resolution on the minutes of the corporation. (*W. A. Co. v. Barlow*, 63 N. Y. 63; *T. T. R. Co. v. McChesney*, 21 Wend. 296; *Bagley v. C., N. & S. H. R. R. Co.*, 165 N. Y. 179; *Cunningham v. M. S. & T. C. R. R. Co.*, 63 Hun, 441; *Nutting v. K. C. E. R. R. Co.*, 21 App. Div. 72; *Wilson v. K. C. E. R. R. Co.*, 114 N. Y. 487; *Howell v. E. D. Co.*, 129 N. Y. 625.) The contract was performed in full by the plaintiff, and the defendant received and accepted the benefit of its performance, and will not now be permitted to avoid it. (*T. P. R. R. Co. v. Wilson*, 40 Atl. Rep. 597; *Parish v. Wheeler*, 22 N. Y. 494; *C. & A. R. R. Co. v. L., etc., R. R. Co.*, 48 N. J. L. 530; *Ellerman v. C. J. R. R. Co.*, 49 N. J. Eq. 242; *Chapman v. I. R. Co.*, 41 Atl. Rep. 690; *Prindle v. W. L. Ins. Co.*, 73 Hun, 448; 149 N. Y. 614; *The Sappho*, 94 Fed. Rep. 545; *P. C. & S. L. R. Co. v. K. & H. R. Co.*, 131 U. S. 371; *Hooker v. Eagle Bank*, 30 N. Y. 83; *Ellis v. H. M. Co.*, 9 Daly, 78.)

HISCOCK, J. The plaintiff is engaged in the business of procuring advertisements to be published in newspapers. The

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defendant is a corporation incorporated under the laws of the state of New Jersey, and having its business office in the city of New York.

A dispute arose between a majority of the board of directors of the defendant and its president, which ultimately ripened into a contest for the control of the management of the defendant and resulted in the publication through plaintiff in various papers of four notices, and it is for services and expenses in procuring the publication of these notices that the latter has sought recovery in this action. Thus far it has been allowed to recover for all of them, but we think that this was erroneous, and that it should be limited to a recovery for those in connection with the first one only.

The event which directly led up to the advertisement of the notices was a meeting of the board of directors of the defendant. At this meeting the directors adopted a resolution which, in substance, gave their version of the dispute with the president and called, as properly might be done, a special meeting of the stockholders to pass upon various propositions. Said resolution instructed the secretary "to call such meeting."

After the meeting in an informal discussion a majority of the board authorized the secretary to consult with an attorney who was present with reference to preparing and giving the notice, and these persons united in preparing in proper form a notice of the meeting, and which, in accordance with the instructions of the attorney, the plaintiff caused to be published and advertised. This was the first notice.

There was no subsequent resolution authorizing, directly or indirectly, the publication of the other notices. As a result of informal consultations the secretary of the defendant and the attorney co-operated in preparing them and the attorney directed the plaintiff to procure their publication.

Very briefly summarized, the first of these urged the stockholders to execute and return to the directors contending against the president proxies for the special meeting which had been mailed to them. The second notice was directed to

the stockholders and was a reply to a circular issued in behalf of the president calling for proxies. The last notice was directed to the stockholders and gave a somewhat extended account of the special meeting at which the president had outvoted the directors and contained various suggestions as to what the latter might do in consequence of this result.

All of the notices were signed by a majority of the persons who were acting as directors, but in only the first and last ones did they describe themselves as such directors as distinguished from individuals.

We think that the resolution above referred to instructing the secretary to call a special meeting of the stockholders, construed and perhaps somewhat broadened by the subsequent conference of a majority of the directors at which they instructed the secretary and attorney to prepare a notice of such meeting, sufficiently authorized the publication of the first notice in suit and that its publication was a legitimate charge against the corporation. It may be, as contended by the appellant, that the by-law of the defendant which required the secretary to give "proper notice of all meetings of stockholders" only contemplated the notice prescribed by another by-law to the effect that at least two days' notice by mail should be given of such meetings, and it may be that such notice would have been a sufficient compliance with legal requirements. But it appeared in this case that transfers of defendant's stock were numerous and that a notice by mail of only two days to stockholders of record probably would not be a fair or sufficient notice of the meeting to actual stockholders. Under such circumstances it was not only proper, but in our judgment commendable, that the directors and secretary charged with that duty should give a more widespread and effective notice of the meeting than was required by the by-laws. A bitter dispute had arisen over the alleged retention by the president of a considerable amount of property which substantially affected the rights of the corporation and of the stockholders, and it certainly was for the interest of the latter that they should be fully advised of a meeting

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which was to pass upon this dispute. Proper and honest corporate management was subserved by widespread notice to stockholders of questions affecting the welfare of the corporation, and there is no impropriety in charging the latter with any expenses within reasonable limits which were incurred in giving sufficient notice of a special meeting at which the stockholders would be called upon to decide these questions.

The remaining notices were not legally authorized and were not legitimately incidental to the meeting or necessary for the protection of the stockholders. They rather were proceedings by one faction in its contest with another for the control of the corporation, and the expense thereof as such is not properly chargeable to the latter. This is so apparent as to the last two notices that nothing need be said in reference to them but a few words may be said in regard to the first one calling for proxies. It is to be noted that this is not the case of an ordinary circular letter sent out with and requesting the execution of proxies. The custom has become common upon the part of corporations to mail proxies to their respective stockholders often accompanied by a brief circular of directions, and such custom when accompanied by no unreasonable expenditure is not without merit in so far as it encourages voting by stockholders through making it convenient and ready at hand. The notice in question, however, was not published until after proxies had been sent out. It simply amounted to an urgent solicitation that these proxies should be executed and returned for use by one faction in its contest, and we think there is no authority for imposing the expense of its publication upon the company. It may be conceded that the directors who caused this publication acted in good faith and felt that they were serving the best interests of the stockholders, but it would be altogether too dangerous a rule to permit directors in control of a corporation and engaged in a contest for the perpetuation of their offices and control, to impose upon the corporation the unusual expense of publishing advertisements or, by analogy, of dispatching special messengers for the purpose of procuring proxies in their behalf.

Thus we have it that the publication of the last three notices was not authorized by the board of directors and that it could not have been lawfully authorized even if the attempt were made. They bore upon their face sufficient notice to the plaintiff that they were of a character beyond the limit of anything which could be published in behalf of or at the expense of the corporation, and there is no opportunity for the claim that it has been misled by an apparent authority into performing the acts and in incurring the expenses in question. Neither is there anything in the theory urged by the respondent that this is an executed contract of which the corporation has received the benefit and for the expense of carrying out which it should, therefore, pay. That begs the whole question that these publications were for the benefit of the corporation and is unsustained by the facts.

In accordance with these views the judgment should be reversed and a new trial granted, with costs to abide event, unless the respondent consents that the same be modified by striking out the items respectively of \$277.70, \$173.65 and \$208.70, with interest thereon from February 7, 1902, and in which case the judgment is affirmed, without costs in this court to either party.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ., concur.

Judgment accordingly.

HERBERT MEE, an Infant, by EDWIN A. WATSON, His Guardian ad Litem, Appellant, v. HENRY W. GORDON et al., Respondents, Impleaded with Others.

1. WILL.—WHEN ABSOLUTE GIFT IS CUT DOWN TO LIFE ESTATE, WITH ABSOLUTE REMAINDER TO DEVISEE'S WIFE AND CHILDREN. A testamentary provision dividing an estate equally between testatrix's brother and three others, share and share alike, is modified by an immediately succeeding clause, directing that the share due her brother be invested by her executors "for his benefit during his natural life and for the benefit of his wife and his issue after his death," so that an apparently

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absolute gift of such share is cut down to a life estate therein; and such clause creates a valid express trust to collect the rents and profits for his benefit during his lifetime with an absolute remainder to his wife and children.

2. DESIGNATION OF TRUSTEES AS "EXECUTORS" DOES NOT INVALIDATE TRUST PROVISIONS — WHEN DIRECTION TO INVEST TRUST "FOR BENEFIT" OF CESTUI QUE TRUST IMPLIES COLLECTION OF RENTS AND PROFITS AND PAYMENT THEREOF TO BENEFICIARY. The fact that the trust created by such clause is imposed upon persons who are designated as executors rather than as trustees, does not invalidate the trust, since the duties imposed upon a person rather than the name applied to him in a will measure his office and position, and the duties of trustees having been imposed upon such executors, they must be regarded as trustees rather than as executors; nor does the fact that there is no explicit direction that the rents and profits of the brother's share shall be collected and paid over to him as a life tenant prevent the execution of the trust in that way, where it is directed that his share shall be invested for his benefit during his natural life and there is no other possible way in which such direction can be carried out, since such direction necessarily implies that the principal shall be kept intact and no power is given him to dispose of such share by will or otherwise.

3. WHEN TRUST NOT VOID AS SUSPENDING POWER OF ALIENATION. The direction that the investment of the trust should be, after the death of her brother, "for the benefit" of his "wife and issue after his death," does not, under the liberal construction of the will required by law, violate the statutes relating to the suspension of the power of alienation, in that it requires the investment to be kept and the trust continued after the death of her brother for the benefit of his wife and children, where there is no provision, either by express terms or necessary implication, that a trust was intended for their benefit rather than a final and absolute distribution of the share.

Mee v. Gordon, 104 App. Div. 520, reversed.

(Argued January 18, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 29, 1905, which reversed an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directed a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Gerard Roberts for appellant. There is no ambiguity in the so-called second disposition of the property of Harriet

M. Kemp. (*Goodwin v. Coddington*, 154 N. Y. 283; *Smith v. Bell*, 6 Pet. 79.) Even if the testatrix's intention had been to direct the executors to invest the share of John B. Mee for the benefit of his wife and issue after his death, this would not render the clause void nor suspend the power of alienation unlawfully. (*Matter of Mount*, 185 N. Y. 169.) The general gift of the income of real or personal property, making no mention of the principal, is equivalent to a gift of the property itself. (*Patterson v. Ellis*, 11 Wend. 298; *Hatch v. Bassett*, 52 N. Y. 362; *Locke v. F. L. & T. Co.*, 140 N. Y. 135-146; *Bishop v. McClellan*, 44 N. J. Eq. 450; *Lawton v. Woodward*, 5 Del. Ch. 505.) A power of sale will be implied in the executor where it is necessary in order to carry out the provisions of the will. (*Ward v. Ward*, 105 N. Y. 74; *Marx v. McGlynn*, 88 N. Y. 376; *Morse v. Morse*, 85 N. Y. 53; *Lesser v. Lesser*, 11 Misc. Rep. 223; *Meakings v. Cromwell*, 5 N. Y. 140; *Stewart v. Hamilton*, 37 Hun, 21.) The intention of the testatrix should be sought, and it was Harriet M. Kemp's evident intention that John B. Mee should enjoy only a life interest in one-fourth of her estate, and that upon his death, said one-fourth should pass as an absolute gift to his wife and his son in equal shares. (2 Jarman on Wills, 44-47; *Sherrat v. Bentley*, 2 M. & K. 149; *Philips v. Davies*, 92 N. Y. 199; *Nellis v. Nellis*, 99 N. Y. 505; *Mead v. Maben*, 131 N. Y. 255; *Buell v. Southwick*, 70 N. Y. 581; *Hennessey v. Patterson*, 85 N. Y. 91.) All parts of an instrument should be read together in ascertaining its meaning, and no part should be rejected if the meaning of the testatrix can be arrived at and her wishes carried out by giving effect to all clauses. (*Norris v. Beyea*, 13 N. Y. 282; *Tyson v. Blake*, 22 N. Y. 558; *Wager v. Wager*, 96 N. Y. 164; *Kurtz v. Weichmann*, 75 App. Div. 28; *Matter of Dippel*, 71 App. Div. 599.)

George H. Taylor, Jr., Albert J. Appell and Henry W. Bookstaver for respondents. An undivided one-fourth part of the testatrix's property was given in one part of the will

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under consideration, in clear and decisive terms, to John B. Mee. It cannot be taken away or cut down to a life estate by raising a doubt as to the meaning or application of the subsequent obscure clause, nor by the subsequent words in the will which are not as clear and decisive as the words giving the estate. (*Thomas v. Snyder*, 43 Hun, 14; *Clark v. Lueppe*, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 N. Y. 356; 15 Hun, 309; *Oothout v. Rogers*, 59 Hun, 100; *Haight v. Pine*, 3 App. Div. 434; *Freeman v. Coit*, 96 N. Y. 63; *Thomas v. T. C. Nat. Bank*, 19 Misc. Rep. 470; *Thomson v. Hill*, 87 Hun, 111; *Rozell v. Thomas*, 39 S. W. Rep. 351; *Washbon v. Cope*, 144 N. Y. 287.) The trust attempted to be created by the testatrix in the clause of the will in question is void. (L. 1896, ch. 547, § 76.)

HISCOCK, J. This is an action for partition and involves the construction of the last will and testament of one Harriet M. Kemp, who at death was seized of the premises of which partition is sought. The underlying specific question is whether a clause in said will which, standing by itself, devised an undivided portion of the premises to one John B. Mee, plaintiff's father, absolutely, was by an immediately succeeding clause so modified as to reduce said estate to an interest for life, with remainder to said Mee's wife and children.

The learned Appellate Division held that the first clause was not so modified and that, therefore, upon the death of the plaintiff's father no interest passed to the former. We are thoroughly persuaded that this decision not only defeated the plain purpose of the testatrix, but that it is unwarranted and should be reversed.

The clauses under review read as follows:

"In the event of my husband and myself dying at one and the same time or within a short period of each other, I give, devise and bequeath my estate to be equally divided between my sister Elizabeth Illensworth, my brother John B. Mee, my nephew William P. Illensworth and my niece Florence C. Illensworth share and share alike. I hereby direct that the

share due my brother John B. Mee be invested by my Executors for his benefit during his natural life and for the benefit of his wife and his issue after his death."

The husband of the testatrix died a short time before she did, so that this disposition became operative upon the probate of the will.

It may be conceded, of course, that the first sentence standing alone and unmodified would have given a share to John B. Mee absolutely and without qualification. But it does not stand alone and unmodified. 'It is immediately, without the intervention of any other provision or purpose, followed by a second sentence which is clearly connected with and related to it, and which specifically treats of the share referred to and created in the first sentence. When this second sentence directs that "the share due my brother John B. Mee be invested," etc., it not only plainly but necessarily refers to the share which is described and created in the immediately preceding sentence. There is nothing else for it to refer to. It is utterly irrelevant and inexplicable unless it does refer to that share. Otherwise it is predicated upon nothing, means nothing and there is no excuse for its existence. As we look at it, even in the light of the learned opinion below and of the argument of counsel, it seems to us that this second sentence only becomes subject to the criticism of ambiguity and obscurity which is leveled at it when we deny to it its connection with the first sentence, and its natural and obvious meaning, and seek to find some other purpose which is nowhere disclosed in the will. We assume that if the testatrix had changed this entire provision, saying: "I give, devise and bequeath my estate to be divided equally between * * * my brother John B. Mee, * * * share and share alike, except that I hereby direct that the share due my brother John B. Mee * * * be invested," etc., no one would contend that the result of such provision as a whole was to create more than a life interest. It is possible that such form would have been a little plainer than the one in question, but not much, and it is too well settled to require the citation of

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authorities that the intent of the testatrix will not be defeated by the injudicious use of punctuation or by the substitution for some perfectly apt word of one less so, providing her meaning can reasonably be found.

We think, therefore, that this second sentence does clearly relate to and modify the effect of the first one in so far as it relates to the interest of John B. Mee, and that it is sufficient to cut down, so far as he is concerned, the absolute estate first suggested to an interest for life even within the rules established by the cases relied upon by respondent like *Banzer v. Banzer* (156 N. Y. 429).

We do not regard it necessary to review all of the cases cited for the purpose of leading us to an opposite conclusion, for the same principles prevail in all of them, the variation in expression of those principles being but the reflection of the differing phase of facts presented in each case. We shall refer at any length only to that authority which seems to be most strongly relied upon by respondents.

The *Banzer* case held that an absolute estate created by an earlier provision in the will was not cut down to a lesser estate or interest by a later provision, but the facts upon which that decision was reached are removed by very many degrees from similarity to those now presented to us. This is made apparent not only by an examination of the facts themselves, but by a consideration of what was said by Judge MARTIN. The action involved an alleged interest of a widow in real property which passed under the will of her husband. The first provision, as stated in the opinion, read: "I give and bequeath to my wife all my real and personal estate at present or hereafter in my possession; my real estate, consisting at present of a part of a house known as number 220 West 32d Street." This was the only provision which in any way related to the real estate of the testator, and, as was conceded, disclosed a clear and manifest intent to devise to the wife the real estate in question and to vest in her an absolute fee to the property. As was said by Judge MARTIN: "No clearer or more decisive language could have been employed to effec-

uate that purpose." After this provision another was inserted in the will as follows: "And my personal estate, and whatever belonging to me at my death, whatsoever and wheresoever, of what nature, kind and quality soever may be, that she shall have undisputed right to and dispose of according to her own judgment; that, after her death, my beloved children, or their executor, administrator, shall divide the same, share and share alike."

Reviewing this last clause, Judge MARTIN said that it was probable that it was intended to apply only to personal property, adding: "But be that as it may, we think it is quite apparent that that clause was not intended and cannot be held to affect or cut down the devise of his real estate to his wife. Its provisions are distinct and disconnected from the clause disposing of the real estate in suit. The manifest purpose of that provision was to dispose of the remainder of his property not previously and specially devised, and not to change or modify the previous provisions of his will."

It is perfectly manifest that natural and legal construction led directly to the conclusion thus stated. No reasoning can make plainer than does a mere reading of the last clause that its controlling purpose is the disposition of personal rather than of real estate, and that there is no language used which within any principle of interpretation ever adopted sufficiently connects the last clause to the first one and reduces the absolute devise first made to a lesser estate.

But it is urged that assuming the later clause before us to be connected with and applicable to the first clause and otherwise sufficient to limit the interest of John B. Mee to one for life, said later clause is subject to such vices as to make it ineffective to accomplish such result. These alleged faults are, first, that it does not create any authorized trust for the life of John B. Mee, and, secondly, that if it does create a trust for his life it seeks to continue the same during the lives of his wife and children and, therefore, offends against the rule relating to the suspension of the power of alienation. It is possible that if the predominating purpose in the

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construction of wills was to seek faults and declare them invalid, we might be led to the conclusions thus urged upon our attention. But remembering that the opposite purpose should prevail where legally possible we have no great trouble in determining that the clause in question created a valid express trust to collect the rents and profits for the benefit of John B. Mee during his lifetime, and that the disposition contemplated by the testatrix after his death was an absolute remainder to his wife and children. We will take up the objections urged to the clause in the order stated.

The duty of investing and administering the share in question it is true is imposed upon persons who are designated as executors rather than trustees, but it is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position, and that where the duties of a trustee are imposed upon a person he will be regarded as a trustee rather than an executor. (*Tobias v. Ketchum*, 32 N. Y. 319, 327; *Ward v. Ward*, 105 N. Y. 68, 74.)

No power of sale is expressly conferred upon the executors, but they are directed to invest the share being disposed of, and if compliance with this direction involves the sale of real estate the possession of such power will be implied. (*Van Winkle v. Fowler*, 52 Hun, 355; *Dorland v. Dorland*, 2 Barb. 63; *Morton v. Morton*, 8 Barb. 18.)

The testatrix does not say in explicit words that the rents and profits of the share with which she is dealing shall be collected and paid over to the life tenant. But there is no possible way in which her commands with reference to it can be obeyed except by doing that very thing. It is directed that the share shall be invested, and this necessarily implies that the principal is to be kept intact. It is directed that it shall be invested for the benefit of the life tenant during his natural life and no power is given to him of disposition by will or otherwise, and how then shall he get the benefit of this share thus invested except by the collection and payment to him of the rents and profits thereof.

In short, by express provision and necessary implication we seem to find all of the essential elements of a familiar express trust.

Passing to the second criticism, it is true that the investment of this share is also declared to be for "the benefit" of the life tenant's wife and issue after his death, but certain prominent features of this provision lead naturally to the interpretation that an absolute disposition in remainder was intended rather than the creation of a second trust. We must remember all through the construction of this will that apparently it was formulated by the testatrix herself, and that, therefore, we must measure the language and seek her intentions somewhat from the standpoint of a layman. The testamentary scheme which we have credited to her of creating a life trust for her brother made it necessary or proper that there should be an investment of the property. Such investment would be for his benefit during life. It was also natural and appropriate that the testatrix should direct that this investment, secondarily, should be for the benefit of the wife and children. That was the fact. It was for their benefit. But we discover nothing which requires that this benefit should be derived only through the medium of a trust. The direction for investment of the share became applicable immediately upon her death and was incidental to the life trust. Its purpose would be served by carrying the principal of the share forward to the death of the life beneficiary with final distribution at that time. If an investment had been directed after the death of the life tenant for the benefit of the others, then there might be found some evidence of a purpose to tie the property up in a trust commencing at that time for a second set of lives. But such aspect is wanting. Neither does the direction that the investment should be after the death of the husband "for the benefit" of the wife and children necessarily or even by any preponderance of argument lead to the conclusion that a trust was intended rather than a final and absolute distribution of the share. There is nothing in the quoted words which is sacred to the idea of a trust. On the

other hand it is obvious that in no manner would the beneficiaries more thoroughly and fully get the benefit of the property than by passing it over to them in absolute remainder with unlimited right of use and enjoyment. This view and the conclusion that testatrix intended such an absolute remainder rather than a trust, are supported by what was held and said in *Crain v. Wright* (114 N. Y. 307).

In that case the question arose whether a devise to the testator's widow of certain lands "to have and to hold for her benefit and support" conferred an estate in fee or for life, and the former was held to be the correct answer. Judge VANN after reference to the provisions of the Revised Statutes that the term "heirs" or other words of inheritance shall not be requisite to create or convey an estate in fee and that every grant or devise of real estate shall pass all the estate or interest of the grantor or testator "unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant," said: "We think that the words 'for her benefit and support' indicate the reason for making the gift, rather than the intention of the testator to annex a condition or limitation to the gift. * * * Moreover, the premises were devised to her not only for her support, but for her benefit. The use of the word 'benefit' in connection with a gift of property, is significant. It is consistent with a devise in fee, but inconsistent with the devise of a life estate. A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate."

What we may regard as the natural meaning and scope of the provision for the benefit of the wife and children as framing an absolute estate in remainder is confirmed by a comparison of the provision for them with that for the life beneficiary. Some very significant omissions will be noted in the case of the former. The benefits to be derived by John B. Mee are expressly limited to his life. No such limitation is applied to his successors. Then no course is marked out

for this share after the death of the wife and issue, as properly would have been done if their interest was limited by life, but the "benefit" is conferred upon them absolutely and without qualification as to manner or duration of enjoyment. Under all of these circumstances we think that we are amply justified in interpreting the intent of the testatrix to have been to give an absolute remainder.

As was said in *Du Bois v. Ray* (35 N. Y. 162), where it was being contended, as here, that the testator had provided for an unlawful suspension of the power of alienation: "It is to be presumed that the testator intended to make a legal disposition of his estate, and not a void or illegal one; intestacy is what he never intended or contemplated. It is the duty of the court to give to the language used such construction as will make the instrument or limitation legal and valid, if it can be done in harmony with well-settled rules, with the manifest intent, and adjudicated cases, rather than such construction as will render them illegal and nugatory."

The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs to the appellant in both courts.

GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ., concur; CULLEN, Ch. J., concurs in result.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE W. PERKINS, Respondent, v. JOSEPH F. MOSS et al., Defendants.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

1. CRIMES — ONE ARRESTED ON A CRIMINAL CHARGE BY INFORMATION ENTITLED TO WRIT OF HABEAS CORPUS BEFORE EXAMINATION — WARRANT IS A NULLITY IN THE ABSENCE OF ANY EVIDENCE TO SUSTAIN IT. One arrested under a warrant issued by a magistrate charging him with a crime is not obliged to await an examination, but may at once resort for his protection to the writ of habeas corpus. (Code Civ. Pro. §§ 2015—

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2019; Code Crim. Pro. §§ 188-197.) The court upon such a proceeding will look back of the warrant and see if the facts stated in the depositions of the prosecutor and his witnesses conferred jurisdiction upon the magistrate to issue it (Code Crim. Pro. § 149); and unless there is some evidence to sustain it, the warrant is a nullity and the defendant is entitled to his discharge.

2. EVIDENCE — WHEN DEFENDANT'S DECLARATION AS TO INTENT WITH WHICH AN ALLEGED CRIMINAL ACT WAS COMMITTED IS CONCLUSIVE. The adoption, in its entirety, by the district attorney, of a letter written by the defendant, containing an explanation of his acts and affirmatively disclaiming any purpose to violate the law and which was used as proof of the facts upon which the prosecution based an application for a warrant of arrest for grand larceny, must be regarded as the use of a prior declaration made by the defendant, it was equivalent to his examination; and as such declaration affirmatively denied the existence of any criminal intent, and there was no inherent improbability therein and no other evidence from which such intent could be inferred, the magistrate had no jurisdiction to issue the warrant.

3. GRAND LARCENY — APPROPRIATION BY DIRECTOR OF CORPORATE FUNDS FOR POLITICAL PURPOSES — IN ABSENCE OF EVIDENCE ESTABLISHING FELONIOUS INTENT, MAGISTRATE HAS NO JURISDICTION TO ISSUE WARRANT OF ARREST. An information upon which a warrant of arrest was issued, charging the defendant with the crime of grand larceny in the first degree, contained in substance the following facts: The president of an insurance company, in whom was vested, and who had for years been exercising, the power to make disbursements of the corporate funds upon his sole authority, had agreed that the insurance company would contribute to the presidential campaign fund of the Republican national committee up to the amount of \$50,000, and to protect the company against other demands for political purposes he requested the defendant, one of the company's trustees, to personally carry out the agreement by advancing the money. The defendant acquiesced in the president's request, advanced the money and, subsequently, the president brought up the subject of his reimbursement, informally, before a full attendance of the members of the finance committee of the company. The president's purpose was not that the finance committee should take official action in the matter, but that the trustees should be informed of what he had done, and that he might have their opinions upon the matter. It was the general opinion that the president should cause the relator to be reimbursed for his advances out of the corporate funds; what was brought before this body of the company's trustees was the claim or right of the defendant to be paid the moneys which he had paid out by the procurement of the president, in order that the latter's agreement on behalf of the company might be carried out; the president, exercising the executive power, with which he appears to have been clothed, directed the treasurer

of the company to draw a check for the amount of the defendant's claim, which was made payable and delivered to the firm of which defendant was a member; the day before the issuance of the warrant the defendant, at the request of the district attorney, wrote a letter stating in substance that the moneys alleged to have been feloniously appropriated were received by him in satisfaction of his claim; that he had acted in the honest belief that he was benefitting the company, and had derived no personal advantage; this letter was used by the prosecution as proof of the facts upon which the application for the warrant was based. *Held*, that the defendant might be regarded as having aided and abetted the act of the president of the corporation in contributing corporate funds for the purposes of a political campaign; that such act, at the time in question, was neither a common-law nor a statutory crime, although it was beyond the purposes of the corporation and was wholly unjustifiable and illegal; that when the defendant took part in the appropriation of the moneys in question, unless he did so *animo furandi*, with the intent to steal it, he was not properly chargeable with the crime of grand larceny, whatever might be the civil consequences of his act; that the case was not only barren of any other evidence calling for the exercise of the judicial judgment of the magistrate as to whether there was probable cause to believe that the crime charged had been committed, but there being no inherent improbability in defendant's statement that he had acted in the honest belief that he was benefitting the company, in the absence of any evidence contradicting it, the magistrate had no jurisdiction to issue the warrant.

People ex rel. Perkins v. Moss, 113 App. Div. 329, affirmed.

(Argued December 10, 1906; decided February 26, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 25, 1906, which reversed an order of Special Term dismissing a writ of habeas corpus and directed the discharge of the relator from custody.

Upon a warrant issued by a city magistrate of the city of New York, charging him with the crime of grand larceny in the first degree, the relator was arrested by, and taken into the custody of, a police officer. Thereafter, upon a petition to the Supreme Court, setting forth his arrest and averring that the warrant was unlawfully issued and that the petitioner was illegally restrained by virtue thereof, writs of habeas corpus and of certiorari were issued directed to the defendants the police officer and the city magistrate, and commanding the

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production of the relator and the certification of the cause of his imprisonment. Thereupon, the relator was brought before a Special Term of the Supreme Court and, upon the return made by the city magistrate to the writ of certiorari and after a hearing had, the writ of habeas corpus was dismissed and the relator was remanded into custody. Upon appeal to the Appellate Division, in the first department, this order was reversed and the discharge of the relator was ordered. The People then appealed to this court.

The information, upon which the warrant of arrest was issued, charging the relator with the crime of grand larceny in the first degree, was contained in certain depositions taken before the magistrate. One deposition was by Darwin P. Kingsley, a vice-president of the New York Life Insurance Company, which stated that, in December, 1904, when he was secretary of the finance committee of that company, a meeting was had of all of the members of the committee, including McCall, since deceased, who, as president of the company, was *ex officio* a member. It was stated by the president that, on behalf of the insurance company, he had promised to pay to Cornelius Bliss, as treasurer of the Republican national committee, for use in the presidential campaign of that year, such sums as should not exceed \$50,000, and that Perkins, this relator, then a vice-president of the company, at his, the president's, request and to carry out the agreement with Bliss, had advanced to the latter large sums of money. McCall did not ask the committee to take any official action upon this statement, but desired to inform it of the facts. Conversation was had in regard to the matter and no official action was taken by the committee; but "it was the expressed opinion of those present that McCall should cause Perkins to be reimbursed, for the sums so advanced, out of the funds of the company." It was stated, also, in the deposition that McCall, "by virtue of his office, had power to make disbursements, known as disbursements upon executive order."

Another deposition was by Edmund D. Randolph, a trustee and the treasurer of the insurance company, who was present

at the meeting of the finance committee referred to in the deposition of Kingsley, which corroborated Kingsley's statements as to what had taken place. Randolph stated that some time after the meeting in December, 1904, he drew a check to reimburse Perkins, the relator, for the moneys he had advanced to Bliss; that the payment was made by the treasurer's check to the order of J. P. Morgan & Co., a firm of which Perkins was a member; that this check was drawn by him pursuant to the direction of McCall the president; that, "at that time, large powers were vested in McCall as president to order disbursements to be made from the funds of the company without first submitting for approval to any committee;" that that power had been exercised "upon his sole personal authority" for many years without having been challenged and that Perkins had had nothing to do with the transaction of the drawing of the check, or of the book entries.

The deposition was taken of Thomas A. Buckner, a vice-president of the company, who identified a letter written by the relator to the district attorney the day before the issuance of the warrant of arrest. The relator's letter was written in response to the request of the district attorney for a statement of the former's connection with the contribution made by the insurance company to the Republican national committee, in 1904. From this letter it appears that Bliss, the treasurer of that committee, had informed the relator of the promise of McCall, the president of the company, that the company would contribute up to the sum of \$50,000 towards the campaign; that McCall, upon inquiry, corroborated Bliss' statement and explained that, as demands had been made upon him for other political contributions by the company, which did not seem to him to be for its interest to make, "it would make it easier for him to refuse such demands, if the payment to the Republican Committee was not at that time made directly from the funds of the company;" that he asked relator to see Bliss and to make the payments personally and that he, McCall, "would see that

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the matter was taken care of later on ;" that, accordingly, the relator advanced to Bliss, from his own resources, various sums amounting to \$48,500 ; that in December, 1904, upon the subject of his reimbursement coming up between himself and the president, it was concluded to take the matter up with the members of the finance committee and later, at a meeting of the committee, after McCall had explained, that, at his request, the relator had made the above advances and that provision should be made for reimbursement, "the conclusion was reached that the President should cause me to be reimbursed" and that a check to the order of the relator's firm of J. P. Morgan & Co. was afterwards drawn and delivered by the treasurer of the company. The letter concludes with this clause: "It never occurred to me that there could be any question as to the propriety of such expenditure, which I believed to be for the benefit of the Company. It has come to me as a total surprise that the legality of such payments should be questioned. While so asserting, it is not my intention to dispute or deny civil liability to account to the Company for these moneys. * * * I derived no personal advantage of any kind from the transaction ; and certainly I had no intent other than to serve the interests of the Company." The district attorney was authorized to make any use of the statements in the letter and the relator waived any privilege, or immunity, in connection with it.

William Travers Jerome, District Attorney (Wallace Macfarlane and Edward B. Whitney of counsel), for appellant. If there is any evidence in support of a magistrate's decision, it cannot be reviewed upon habeas corpus. (Code Crim. Pro. § 150 ; *Burr Case*, 25 Fed. Cas. 12 ; *U. S. v. Hughes*, 70 Fed. Rep. 972 ; *Horner v. U. S.*, 143 U. S. 570 ; *Kranskopff v. Tallman*, 35 App. Div. 273 ; *Swart v. Rickard*, 148 N. Y. 264 ; *Matter of Henry*, 13 Misc. Rep. 734 ; *People ex rel. Bungart v. Wells*, 57 App. Div. 140 ; *People ex rel. Farley v. Crane*, 94 App. Div. 397 ; *Matter of McFarland*, 59 Hun, 304 ; *People ex rel. Tweed v. Liscomb*,

60 N. Y. 559; *People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180.) Perkins was an accessory before the fact, and, therefore, a principal under section 29 of the Penal Code. (*U. S. v. Gooding*, 12 Wheat. 460.) There was sufficient evidence before the magistrate to warrant his inferring that the payment was known or feared to be wrong, both by Perkins and by the treasurer. (*People v. Flack*, 125 N. Y. 324.) A corporate officer paying out funds of the corporation without consideration moving to it, and without authority of its members or directors, for a purpose foreign to its business (if not also against public policy) and known or feared by him to be wrong, although payments for that specific purpose have not been specifically covered by any provision of the Penal Code, nevertheless commits the crime of larceny. (*McKenna v. People*, 81 N. Y. 360; *People v. Flack*, 125 N. Y. 324; *U. S. v. Taintor*, 28 Fed. Cas. 7; *Bissell v. M. S. R. R. Co.*, 22 N. Y. 269; *Rex v. Cabbage*, R. & R. 292; *Rex v. Morfit*, R. & R. 307; *Regina v. White*, 9 C. & P. 344; *People v. Woodward*, 31 Hun, 57; *People v. Sherman*, 133 N. Y. 349; *People v. Dimick*, 107 N. Y. 13.)

William N. Cohen, Lewis L. Delafield and Howard S. Gans for respondent. That the money was paid openly and under a claim of right suffices to defeat the charge of embezzlement; this would be true even though it should be established that the claim was ill-founded. (1 Bishop on Crim. Law, 297, subds. 1, 2; 1 Whart. on Crim. Law, § 230; 2 Russell on Crimes, 163; *Rex v. Hall*, 3 C. & P. 409; *Regina v. Creed*, 1 C. & K. 63; *Regina v. Norman*, 1 C. & M. 501; *McCourt v. People*, 64 N. Y. 583; *People v. Burton*, 1 N. Y. Cr. Rep. 297; *People v. Grim*, 3 N. Y. Cr. Rep. 317; *People v. Ouley*, 7 N. Y. S. R. 794; *Devine v. People*, 20 Hun, 98; *Abrams v. People*, 6 Hun, 491.) The relator having paid out his own money to redeem the promise of the president of the New York Life Insurance Company made for the corporation, and having accepted repayment of the funds thus disbursed, there is no evidence of an appropriation

of funds to a use other than that of the corporation, and the writ should be sustained by reason of the absence of that element of the crime. (Penal Code, § 528, subd. 2; *Koehler v. Reinheimer*, 26 App. Div. 5; *Leslie v. Lorillard*, 110 N. Y. 519; *Flynn v. B. C. R. R. Co.*, 158 N. Y. 493.) There is no evidence that the subscription was *ultra vires*; but even if it be assumed that it was beyond the corporate powers that circumstance tends neither to an inference that it was not to the corporate use nor to an inference of criminality. (*Paul v. Virginia*, 8 Wall. 168; *Hooper v. Cal.*, 155 U. S. 648; *N. Y. L. Ins. Co. v. Cravens*, 178 U. S. 389; *Nutting v. Mass.*, 183 U. S. 553; *Ingraham v. Reform Club*, 12 Phil. 264; *Hollis v. D. T. Sem.*, 95 N. Y. 166; *People v. Hawkins*, 157 N. Y. 1; *Matter of Lampson*, 161 N. Y. 511; *Morawetz on Corp.* § 556; *Holmes v. Willard*, 125 N. Y. 75; *Robertson v. Bullions*, 9 Barb. 64, 132.) Even if it be assumed that the subscription was an *ultra vires* act, there is no evidence that the relator had any reason to believe it to be such, and therefore no inference of wrongful intent, or of any criminal intent is to be drawn from the *ultra vires* act. (*Moss v. Cohen*, 158 N. Y. 240; *Myers v. State*, 1 Conn. 502; *State v. Nussenholtz*, 76 Conn. 93; *Goodspeed v. I. St. Ry. Co.*, 184 N. Y. 351; *Knowles v. City of New York*, 176 N. Y. 430; *Cutter v. State*, 36 N. J. L. 125; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, 45 N. Y. 169; *Taylor v. Com. Bank*, 174 N. Y. 181; *Rudd v. Robinson*, 126 N. Y. 113.) Criminal intent is a fact that must be found before the relator can be held. There is not sufficient evidence in the record upon which the finding can be based, and hence no crime is made out. (*People v. Wiman*, 148 N. Y. 29; *Stokes v. People*, 53 N. Y. 164; *People v. Powell*, 63 N. Y. 88; *People v. Plath*, 100 N. Y. 592; *People v. Flack*, 125 N. Y. 324; *Hewitt v. Newburger*, 141 N. Y. 538; *McCourt v. People*, 64 N. Y. 583; *People v. Baker*, 96 N. Y. 341; *People v. Burton*, 1 N. Y. Cr. Rep. 297; *People v. Grimm*, 3 N. Y. Cr. Rep. 317.)

GRAY, J. If the information, which was laid before the magistrate furnished no legal evidence of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime charged had been committed, he was without jurisdiction to cause the arrest of the relator and the latter was entitled to resort at once for his protection to the writ of habeas corpus. Section 2015 of the Code of Civil Procedure provides that "a person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretence, is entitled, * * * to a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom." The petitioner is only required to state, among other things, that he "is imprisoned, or restrained in his liberty; the place where, * * * and the officer or person by whom, he is so imprisoned or restrained." (Sec. 2019, Code Civ. Proc.) The arrest of the relator was an actual restraint of his person, and he was not obliged to await an examination before the magistrate. The provision of the statute, in that respect, was for his benefit; in order that he might be informed of the charge and that he might have the opportunity to examine the witnesses and to make any statement in relation to the charge. (See Code Crim. Proc. secs. 188 to 197.) He could waive these proceedings, however, and, immediately, sue out the writs that the legality of his detention under arrest might be inquired into. The statute, which confers the right to the writ of habeas corpus, has always been construed in favor of the liberty of the citizen. The protection afforded by it against arbitrary and illegal arrest is within the guaranties of our Constitution, and the statutes of the state have always been intended to increase the facilities for the issuance of this great and valuable common-law writ and to insure the prompt hearing and disposition of the petitioner's case.

If the magistrate issued the warrant of arrest without suffi-

cient evidence in the particular case, the process is a nullity. The question, always, must be whether the magistrate acquired jurisdiction to cause an arrest of the person and the court, upon the habeas corpus proceeding, will look back of his warrant and see if the facts stated in the depositions of the prosecutor and his witnesses support his warrant. (Code Crim. Proc. sec. 149; Church Hab. Corp. sec. 236.) If they did not furnish reasonable and just ground for a conclusion that the crime charged had been committed and that the defendant committed it, then jurisdiction was lacking to hold the prisoner in custody for any time. (Code Crim. Proc. sec. 150.)

The relator had the absolute right to question, in this way, the sufficiency of the facts laid before the magistrate to constitute the crime of larceny. That crime is defined in section 528 of the Penal Code; which reads, so far as material, as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, * * * having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation, * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

It is apparent that what constitutes the crime of taking the property of another for the use of the taker, or of that of any other person than the legal owner, is the intention with which the act is committed. Under the statute, the crime of larceny no longer necessitates a trespass; but it does need, as an essential element that the "intent to deprive or defraud" the owner of his property, or of its use, shall exist. The intent, by necessary implication, as from its place in the penal statute, must be felonious; that is to say, an intent without an honest claim of right. It is not now essential, as it was under the Roman and early English law, that the intention of the taker

shall be to reap any advantage from the taking. The statute makes the crime to consist in the intent to despoil the owner of his property. That is necessary to complete the offense and if a man, under the honest impression that he has a right to the property, takes it, it is not larceny, if there be a colorable title. (See Code Crim. Proc. sec. 548; *People v. Grim*, 3 N. Y. Cr. Rep. 317; Bishop's Crim. Law, secs. 297, 851; Wharton's Crim. Law, secs. 883, 884.) The charge of stealing property is only substantiated by establishing the felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act, which distinguish the criminal trespass from a mere civil injury. (1 Hale's P. C. 509; *McCourt v. People*, 64 N. Y. 583.) Doubtless, if the particular act was specified in the penal statute, an honest belief that it was right, while it would purge the act from immorality, would not relieve it from indictability. But when there is no statute on the subject and the act is not one which concerns the state directly, because affecting the peace, order, comfort, or health, of the community, then the wrong done is private in its character and must be redressed by private suit. The act of the president of the insurance company, which the relator may be regarded as abetting, (Sec. 29, Penal Code), that is the contribution of corporate funds for the purposes of a political campaign, was not *malum prohibitum*, or a prohibited wrong; for it was not until two years later that it was made a misdemeanor by the law of 1906. (L. 1906, ch. 239.) The legislature may make that criminal, which was not so before; but we may not reason back of the enactment and predicate crime of an act, which was lacking in criminal intent. It is of the very nature of crime that the criminal act shall involve the violation of a public law, or a wrong, which, because grossly immoral and vicious, affects the public injuriously.

If we turn then to a consideration of the facts, upon which the magistrate ordered the relator to be arrested, it is impossible, reasonably speaking, to find that criminal element which the statute makes a necessary one, the intent of the accused to steal.

When summed up, the evidence amounts to this: that the president of the company, in whom was vested, and who had for years been exercising, the power to make disbursements of the corporate funds upon his sole authority, had agreed that the insurance company would contribute to the presidential campaign fund of the Republican national committee up to the amount of \$50,000 and that, to protect the company against other demands for political purposes, he requested the relator, one of the company's trustees, to personally carry out the agreement, by advancing the moneys. The relator acquiesced in the president's request, advanced the money and, subsequently, the president brought up the subject of his reimbursement, informally, before a full attendance of the members of the finance committee of the company. The president's purpose was not that the finance committee should take official action in the matter; but that the trustees should be informed of what he had done and that he might have their opinions upon the matter. It was the general opinion that the president should cause the relator to be reimbursed for his advances out of the corporate funds. The facts stated by the witnesses showed that what was brought before this body of the company's trustees was the claim, or right, of Mr. Perkins to be repaid the moneys which he had paid out by the procurement of the president, in order that the latter's agreement on behalf of the company might be carried out, and that the president, exercising the executive power, with which he appears to have been clothed, directed the treasurer of the company to draw the check for the amount of the relator's claim. Furthermore, the prosecution in making use before the magistrate of the relator's letter to the district attorney, as an admission of the facts of the transaction complained of, not only made the fact clear that the moneys were paid out to satisfy the relator's claim, but, also, caused it to appear, affirmatively, that the relator had acted in the honest belief that he was benefiting the company and had derived no personal advantage. The magistrate was not bound to accept the letter as establishing the innocence of the accused; but, as a part of

the evidence used to make out the charge, he had his statements explaining the transaction and stating his honest motives. It was equivalent to his examination.

It is, unquestionably, true that the purpose, for which the moneys of the company were promised, was foreign to the chartered purposes of the corporation; but that fact does not make the payment a criminal act. The act not being *malum prohibitum*, nor *malum in se*, the innocent motive of indirectly promoting the corporate affairs, through the supposed advantage of the continuance in power of the Republican administration, purged the act of immorality and it lacked the criminal intent. The company had not the right, under the law of its existence to agree to make contributions for political campaigns, any more than to agree to do other things foreign to its charter; but it had capacity to make agreements, if not prohibited, or inherently wicked. Its act would affect the interests of those concerned with the conduct of the corporate business and effect a private wrong; but it would not be a public offense, or illegal, in the sense of violating any public interest. (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Holmes v. Willard*, 125 ib. 75; *Moss v. Cohen*, 158 ib. 240.) If making the agreement to contribute from the corporate funds was an illegal act, it was because of the limitations upon the corporate powers and not because of considerations of the disadvantage to the company of the act. There are a great many things, which those intrusted with the management of corporate properties are known to do and which they ought not to do, whatever their good motives, not because some statute forbids, but because they are not within the scope of the chartered powers. Their own sense of rectitude and of what is due to those who trust them should admonish them of the wrongful nature of their conduct. It has been well observed that the ultimate welfare of the citizen demands that he shall conform his conduct to the moral law and it concerns him that every one else should conform to it. A moral obligation should be none the less authoritative in the conduct of life that it is binding, only, upon the conscience of the person as a

duty and is imperfect in law from the absence of legal sanction. Courts, however, may not sit to judge the conduct of a defendant by any moral code, or rules of ethics. Their sphere is to ascertain if the facts shown establish the crime charged against him. In the facts stated in these depositions I find none, upon which criminality can be predicated. The essential element of the "intent to deprive and defraud" is nowhere to be found and there is no just basis for the inference. There was no concealment about the transaction and knowledge of it was conveyed to the other trustees. That the relator may have made a mistake of law, which will not relieve him from liability in a civil action, may be true, and he expressly disclaimed in his letter any intention to dispute such a liability; but this was a case where the intent, or good faith, was in issue and then knowledge of the law is immaterial. (*Knowles v. City of N. Y.*, 176 N. Y. at p. 439; *Goodspeed v. Ithaca St. Ry. Co.*, 184 ib. at p. 354.) The relator came to the aid of the president of the company, who, as such, had agreed to contribute moneys to the campaign fund, and advanced the moneys, temporarily. Having done so, for no other reason than for the supposed advantage of the company, his claim to be reimbursed from the treasury of the company is openly presented and it is paid. But within the spirit, if not the letter, of section 548 of the Penal Code, that was not larceny. The section provides that "upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable." This section is an expression of the emphasis which the statute lays upon the intent with which the property of another is taken. It is a qualification of the provisions of section 528 of the Penal Code, defining what shall constitute the crime of larceny. It is of considerable significance, as illustrating the legislative understanding, that when, in 1906, the legislature dealt with the question, specifically, the offense was declared to be a misdemeanor, not a larceny.

The question in this case was whether the facts evidenced

the commission of a crime and that was a question of law, which went to the jurisdiction of the magistrate. They showed that the design to injure, the motive to despoil the company, the wrongful purpose were, all, lacking in the information, which was laid before the magistrate and upon which the warrant issued. This being so, the act of the magistrate was wholly without jurisdiction and the warrant and all proceedings under it were absolutely void. (*Hewitt v. Newburger*, 141 N. Y. 538, 543.)

For these reasons, I advise the affirmance of the order appealed from.

HISCOCK, J. I concur with Judge GRAY in the affirmance of the order appealed from.

Stripped of any collateral and immaterial considerations, such as that of the consequences which may result to the magistrate issuing a warrant without any legal basis therefor, the naked question is whether any evidence was presented to such magistrate which showed reasonable ground for believing that the defendant had committed the crime of larceny. Unquestionably if there was no evidence justifying the inference of such guilt, the magistrate was without jurisdiction and the relator should be discharged.

This court seems to be wholly or practically unanimous in the opinion that the evidence presented to the magistrate would not be sufficient to sustain a conviction of the defendant for the alleged crime and that he should be discharged if convicted thereon. The nature of this case, the attention which it has received and the facts and circumstances disclosed render not at all violent the presumption that the district attorney has now presented all of the evidence within his reach, and, therefore, it is quite probable that the really practical question involved is whether the relator shall be discharged at the present or at a subsequent stage of the proceedings. But however this may be, it will be conceded, as is argued in behalf of the appellants, that if even a slight degree of evidence of the relator's guilt was produced — "something

upon which the judicial mind was called upon to act in determining the question of probable cause," the magistrate had jurisdiction, the warrant was valid and the order appealed from should be reversed.

We are all agreed upon certain fundamental principles pertaining to this case. The contribution by the president of the New York Life Insurance Company from its funds of \$50,000 to a political campaign committee, even in the absence of any statutory prohibition, was absolutely beyond the purposes for which that corporation existed and was wholly unjustifiable and illegal. And while the contribution was suggested and made by the authority and direction of the president of the company rather than by the relator, still the latter was so a party to the execution of the act that he must be regarded as having aided and abetted it, and, therefore, is criminally responsible if a crime was committed.

Further than this, the assumption will be made without critical analysis of its correctness in all respects, that because the relator understood when he advanced his own funds to Mr. Bliss that the same would be repaid to him with moneys of the corporation, he was from the beginning a party to the plan to appropriate such corporate funds to an unauthorized purpose, and that, therefore, when payment was made to him he did not occupy the position of a *bona fide* though mistaken claimant, and does not come within those provisions of section 548 of the Criminal Code which provide that it is a defense to an indictment for larceny "that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable."

But, confessedly, these facts and considerations alone are insufficient to justify the charge which has been laid against the relator. At the time of his arrest there was no statute making the contribution of corporate funds to political purposes of itself a crime, and, therefore, there must be some evidence that the relator in doing what he did was actuated by a felonious, criminal intent. It is agreed upon all sides that the crime of larceny may not be committed unintention-

ally, unconsciously or by mistake, but that in order to accomplish it the perpetrator must have the intent referred to. It may be difficult at all times exactly and satisfactorily to define this intent, but the requirement for it as applicable to this case means that when the relator took part in the appropriation of the moneys in question, he must have had in some degree that same conscious, unlawful and wicked purpose to disregard and violate the property rights of another, which the ordinary burglar has when he breaks into a house at night with the preconceived design of stealing the property of its inmates. There is, as there ought to be in the absence of statutory enactment, a long distance between the act which is unauthorized and illegal and which subjects the trespasser to civil liability, and the one which is legally wicked and criminal and which subjects the offender to imprisonment. It is on this point of criminal intent that I think the district attorney has failed to furnish any evidence whatever on which the magistrate might act, although the burden affirmatively rested upon him so to do.

At the outset it must be borne in mind that some of the circumstances which surround this charge are merely accidental and superficial, and not at all decisive. The fact that this contribution was made by the officers of one of those corporations whose management recently has been subjected to grave criticism, and even that it was made for a purpose properly subjected to condemnation and now absolutely prohibited, are of no legal significance. However public opinion or ethics might distinguish them, the legal principles which control the consideration of this case are the same which would be applicable if the president of a manufacturing corporation had contributed from its funds toward the erection of a church supposed to be for the benefit of its employees, or the officers of a railroad company had contributed its funds or the use of its property and transportation facilities for the temporary relief of the sufferers from some sudden and great calamity. We probably should be compelled to say in each case that the contribution was beyond the purposes of the

corporation and unauthorized and illegal and the officers making the same civilly liable, but it certainly would be a matter of grave import to hold, in the absence of something else, that they might be prosecuted for stealing.

It, therefore, seems to me that we are justified in scrutinizing with care the depositions presented to the magistrate for the purpose of ascertaining whether they do in fact disclose any intent to commit a crime.

Part of the evidence produced consisted of a written statement made by the relator at the request of the district attorney and by the latter adopted deliberately and in its entirety as proof of the facts upon which a warrant should be issued. It affirmatively disproves the existence of any criminal intent upon the part of the relator. It recites the facts which led him to make advances from his personal funds in the first instance and which attended his repayment afterwards, and distinctly disclaims any purpose to violate the law or to act otherwise than for the benefit of the corporation.

But it may be said that the magistrate was at full liberty to believe or reject this statement in whole or in part. It seems to me that this is too broad a statement of the law. Various authorities, like *Becker v. Koch* (104 N. Y. 394) and *President, etc., Manhattan Co. v. Phillips* (109 N. Y. 383), may be found holding that upon the examination of an adverse witness, the party calling him is not as a matter of law bound by explanations or adverse statements which he may make, but that he may ask the jury to disregard the same. But an examination of these cases will show that the jury were permitted to disregard such explanations or statements only because they were contradicted by other facts appearing or by inherent probabilities. Moreover, it is well recognized that especial consideration has been accorded to the exigencies liable to arise upon the examination of a hostile witness where the party compelled to call him cannot anticipate the form which his evidence will take. The natural rules by which to measure the force of relator's statement in this case are those which have been framed in respect to the use of statements and

admissions made by a party outside of the trial. In such a case the party attempting to use the admission knows beforehand just what it is and there is less need for liberal rules in his behalf than in the other case. (It is well settled that where use is made in a judicial proceeding of a prior declaration the entire declaration at the time made so far as relevant must be taken together; a party may not utilize only so much of the declaration as is for his benefit, but he must also admit that which is against his interest and the whole must stand or fall together.) If in a suit upon a note the plaintiff relies for evidence upon the statement of the defendant that he gave the note, he must also accept an accompanying declaration that the note has been paid in full and if this is all the evidence the statement stands as a whole and the proofs fail. (*Carver v. Tracy*, 3 Johns. 427; *Wailing v. Toll*, 9 Johns. 140; *Credit v. Brown*, 10 Johns. 364; *Mumford v. Whitney*, 15 Wend. 380; *Rouse v. Whited*, 25 N. Y. 170; *Platner v. Platner*, 78 N. Y. 90, 103.)

It is only where that part of the declaration which discharges the party making it is in itself highly improbable or is discredited by other evidence that the court may believe one part of the admission and reject the other. (*Kelsey v. Bush*, 2 Hill, 440.)

These rules are especially applicable and equitable in this case, for here the district attorney requested the relator to make the statement in question, and after the latter had done this with apparent fullness and frankness, waiving all those rights and privileges which he had in a criminal prosecution, the former official deliberately, after opportunity for full consideration, employed it as a proper statement of facts upon which the magistrate might act.

It seems to me that not only is there no evidence *aliunde* the statement which contradicts it in the respects wherein it is favorable to the relator, but that upon the other hand the depositions confirm it and indicate the absence rather than the presence of a criminal intent to steal the money of the corporation.

Concededly the relator derived no pecuniary gain from the

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Opinion per HIRSCOCK, J.

expenditure. It does not appear that he had any personal or political end to serve by the contribution, but, so far as we know, individually, he may have been deeply interested in the success of some opposing party. He entered upon the plan of expenditure only at the instigation and request of the president of the company and not of his own original volition. While it appears that the president of the company did suggest this form of contribution as a method, good or bad, logical or otherwise, of deceiving and putting off other applicants for contributions, there is no evidence that the relator ever attempted to conceal his acts, but upon the other hand they were disclosed fully even to the criminal authorities when so requested. No request was made to the officers of the campaign committee for concealment of the fact which was known to them that this was a contribution from the funds of the insurance company. When the time for repayment arrived the president of the company, although accustomed by virtue of his general powers and without specific authority to make what were known as "disbursements upon executive order," disclosed to the entire finance committee of the insurance company what had been done by the relator and the purpose to repay him from the corporate funds, and while no formal resolution was passed upon the subject every member of such committee approved of such payment.

Some importance seems to be attached to the entries which were made upon the books of the company in respect to this repayment and to the fact that the check was made payable to the firm of which the relator was a member rather than to him personally. It affirmatively appears that the relator had no part in making or any knowledge of the entries upon the books of the company, and that the check in repayment was made under the direction of the president of the company rather than the relator.

These facts are all established and must be accepted by the prosecution as true, and there is wanting every one of those circumstances of personal gain, furtive secrecy in the commission of the act and of concealment after commission which, as

essential elements, ordinarily attend the crime of larceny, and if there is any evidence here of a criminal intent it is found simply and solely in the fact that the officers of the corporation have contributed some of its funds to an unauthorized purpose. As already indicated it does not seem to me that this fact is sufficient to sustain the burden thus cast upon it.

In *McCourt v. People* (64 N. Y. 583) the plaintiff in error stopped at a house and asked the daughter of the owner for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, and although forbidden to do so by her, went in and drew some cider. He was indicted for burglary and larceny and it was held that the trial court committed error in refusing to direct his acquittal. It was said: "Every taking by one person of the personal property of another, without his consent, is not larceny; and this, although it was taken without right or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be a crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury." And then further, as applicable to the particular circumstances of that case, "There was not only an absence of the usual indicia of a felonious taking, but all of the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the ear marks which ordinarily attend and characterize it."

It is true that this was said with reference to the evidence produced upon a trial, but a decision denying as matter of law to given facts the requisite probative force must be applicable at any other stage where there is need for such proof.

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CULLEN, Ch. J. (dissenting). I dissent from the decision about to be made. The relator having been arrested under a warrant charging him with the commission of grand larceny, sued out in the Supreme Court a writ of habeas corpus, in aid of which a writ of certiorari was issued. On the return to the writs the relator was remanded to custody by the Special Term. This order was reversed by the Appellate Division and the relator discharged, and from that order an appeal is brought to this court.

That the warrant was sufficient on its face is unquestioned, and the ground on which the relator has been discharged is that the depositions before the magistrate were insufficient to justify the issue of the warrant. Doubtless, where there is no evidence in the depositions tending to show the commission of the crime and the guilt of the defendant, the court may go behind the warrant and discharge the prisoner. (Church on Habeas Corpus, sec. 286.) But there must constantly be borne in mind the radical distinction between the proof requisite for the issue of a warrant and that required for conviction on the trial of the defendant. In the latter case the proof must establish guilt beyond a reasonable doubt. In the former it is sufficient that the evidence shows reasonable ground to believe that the defendant has committed a crime (Code of Crim. Pro. sec. 150), or, as commonly said, a case of probable cause. If there is no evidence whatever justifying the inference of guilt the magistrate acts without jurisdiction, the process is illegal, and both the magistrate and the party suing out the warrant are liable as trespassers. But if "the evidence produced was colorable — something upon which the judicial mind was called upon to act in determining the question of probable cause" — the magistrate had jurisdiction and the warrant was valid. (*Pratt v. Bogardus*, 49 Barb. 89.) It must be further borne in mind that the relator was discharged before examination, and the distinction between a discharge upon the warrant and the depositions on which it was issued and a discharge after examination is important. In the first case the discharge proceeds on the

theory that the arrest is absolutely illegal, the case being destitute of any evidence of guilt calling for a judicial determination, while after examination the Supreme Court, as the successor of the King's Bench, may, even on habeas corpus, review the evidence and reverse the decision of the magistrate. But, as pointed out by Church in his work on Habeas Corpus (Sec. 234; see also Hurd on Habeas Corpus, chap. 6, secs. 3, 4 and 5), such power in reality springs from the superiority and appellate power of the court issuing the writ, and not from the Habeas Corpus Act. Therefore, the question presented to us is the same as that which would arise were the relator to sue the magistrate for false imprisonment in having issued the warrant. If in such an action the court ought to instruct the jury that, as a matter of law, the arrest of the relator was illegal, the relator has properly been discharged; if not, not.

We are, therefore, brought to the question whether there was any evidence in the depositions tending to show that the relator had been guilty of a crime; for "when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process may be valid, until it is set aside by a direct proceeding for that purpose." (*Miller v. Brinkerhoff*, 4 Denio, 118.) In *Swart v. Richard* (148 N. Y. 264) it was held that a deposition stating "deponent believes and has reason to believe that said store was broken into and burglarized by James H. Swart and Wallace Van Evera and another, from the fact that said parties were about that time, i. e., after one o'clock that night prowling around and near the premises," was sufficient to give the magistrate jurisdiction to issue the warrant and to defeat an action for false imprisonment. In that case Judge MARTIN, writing for the court, said: "The deposition contained a statement of facts which was sufficient to call upon the magistrate for judicial consideration and determination, and tended to prove the guilt of the respondent."

It is not necessary to consider whether the facts stated in

the depositions would make out a case of larceny at common law; because for more than a century embezzlement by clerks, agents and officers had been made criminal by statute, and the effect of the Penal Code was to abolish the distinction between the two crimes and make both larceny. By section 528 of the Penal Code, "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person. * * * Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any person other than the true owner or person entitled to the benefit thereof; steals such property, and is guilty of larceny." The depositions show that in September, 1904, the relator, who was a trustee and vice-president of the New York Life Insurance Company, had a conversation with the president of said company, in which the latter stated that he had promised to contribute to Cornelius N. Bliss, treasurer of the Republican national committee, the sum of \$50,000, or so much thereof as might be necessary for the purposes of the Republican campaign. It was then substantially agreed between the parties that the relator should pay the money out of his own funds and thereafter be repaid by the company. In pursuance of this understanding the relator did pay Bliss sums aggregating \$48,500. On December 30, 1904, the relator demanded repayment of the sums advanced by him, which was made by order of the president through the method of a check of the company drawn, not to the order of the relator personally, but to that of J. P. Morgan & Company, a firm of bankers of which the relator was a member. This occurred at a meeting of the finance committee at which the relator's agreement with the president was stated, but no vote authorizing the payment was taken and no minutes of the transaction entered. In the stub of the com-

pany's check book the entry was made, "No. 7283 Dec. 30, 1904, Charge Hanover Office a.c Order of J. P. Morgan & Co. 48,702.50," and in the books of account, the following: "1904, Dec. 30. Hanover Office Account charged — Treasury Department. Cheque J. P. Morgan & Co. \$48,702.50. Entry made by Mattison. Hanover Bank Office Account: Charged Ledger Bo. 3.— Treasury Department. 1904. Dec. 30. By order of President \$48,702.50. Entry made in ledger by Mattison." In the deposition of Darwin P. Kingaley it is averred that the president of the company "by virtue of his office, had power to make disbursements known as disbursements upon executive order; and that said president did not ask the committee as such to take official action on the transaction narrated, but desired to inform the committee of the facts." There was submitted to the magistrate a written statement made by the relator to the district attorney, in which he admitted the understanding with the president as to the payment of the moneys by him to Bliss, and their repayment by the check of the company. He denied knowledge of the entries in the company's books and asserted that when he made the advances and was reimbursed therefor "it never occurred to me (him) that there could be any question as to the propriety of such expenditure, which I believe to be for the benefit of the Company."

It is also unnecessary to consider whether the relator as an officer of the company had at the time in his "possession, custody or control," the funds or property of the company within the provisions of the Penal Code. Certainly the president had such custody and control, and by section 29 of the Penal Code a person who aids or abets the commission of a crime or directly or indirectly counsels its commission, is equally a principal with the person who commits the acts. Nor have the provisions of section 548, that it is a sufficient defense to indictment for larceny that the property was appropriated openly under a claim of title in good faith, any application to the case. The crime, if there was any in this case, commenced when the original agreement was made between

the relator and the president, by which the money of the company was to be appropriated to the use of Bliss and the method was adopted, for the purpose of concealing such appropriation, that the relator should in the first instance pay the money to Bliss and thereafter receive the money of the company. The repayment to the relator was not an independent transaction, but part of the original scheme, and must stand or fall with the legality or criminality of that scheme.

It thus appears that by the joint action of the relator and the president of the company this large sum of money was taken from the funds of the company and given to Cornelius Bliss for expenditure for political purposes. Mr. Bliss, neither in his personal nor in his representative capacity had any claim on the company for the money, legal, equitable or moral. The company was to be permanently deprived of it, for it never was to be returned, nor was any consideration to inure to the company for the money paid. The purpose for which it was to be employed was wholly foreign to the business of the corporation and one in which the company had no possible interest, except that of every citizen in the good government of the country. That this was an illegal misappropriation of the company's funds, for which every director or officer engaged therein was personally liable to the corporation, seems to me too clear for debate. A majority of the Appellate Division so held, and as I read the opinion of my brother GRAY this court is of the same opinion. Hence it is unnecessary to pursue the discussion of this question further. The relator, therefore, falls exactly within the provisions of the Penal Code, so far as the act is involved, not dealing for the moment with the question of the relator's intent and his belief as to his own authority or that of the president. He has without right deprived the company of its property and appropriated the same to the use of another person not the owner nor entitled to the benefit thereof.

But it is said by the judges of the Appellate Division that the misappropriation of the moneys was simply *ultra vires* and not illegal, and reliance is placed upon a quotation from the

opinion of Judge COMSTOCK in *Bissell v. Michigan Southern & N. I. R. R. Co.* (22 N. Y. 258) where he said: "A subscription made by authority of the board of directors and under the corporate seal, for the building of a church or college, or an almshouse, would be clearly *ultra vires*, but it would not be illegal." By a singular fatality there has been entirely overlooked the very next sentence to the one quoted: "*If every corporator should expressly assent to such an application of the funds*, it would still be *ultra vires*, but no wrong would be committed and no public interest violated." Doubtless the action or contract of a corporation may be *ultra vires* and yet be vicious in no other respect, but also the action of a board of directors of a corporation may be not only *ultra vires*, but criminal. If a bank should purchase and operate a railroad the action would be, in the absence of any statutory provision on the subject, simply *ultra vires*, and the corporation could not defend an action against it by a passenger for personal injuries on the plea that the operation of the road was beyond its corporate powers. If, however, the directors of a bank should direct the assets of the corporation to be divided among themselves to the exclusion of the stockholders, the action would not only be *ultra vires*, but on the part of the directors who might receive the money under the resolution simply theft. The appropriation of the funds or property of a corporation towards an enterprise or business upon which the corporation is not under its charter authorized to embark, is merely *ultra vires*, if the enterprise is prosecuted for the benefit of the corporation. But when the money or property is applied, not for the use or benefit of the corporation, but for that of third persons, the act is either a tort or a crime, regardless of the question whether the purpose to which the money is applied is one which the corporation under its charter might or might not have pursued. In other words, where the money is applied to the use of a corporation, but to an unauthorized use, it is *ultra vires*; where it is applied to the use of third parties it is a wrong.

There is this further answer to the argument of the Appel-

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late Division. There is no proof that the corporation authorized the payment to Bliss, and as it would have been an illegal act on the part of the directors (from whom it seems to have been concealed), it must be assumed in the absence of proof to the contrary that it was not authorized. "Power to bind the corporation can be presumed to exist only in its executive agents and officers within the scope of its ordinary business and their ordinary duties." (*First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278.) It appears by a statement in one of the affidavits already quoted that the president by virtue of his office "had power to make disbursements known as disbursements upon executive order." Plainly the authority so given to the president was solely to make disbursements for the use and benefit of the corporation. If that is to be construed as an authority for the president to appropriate the moneys of the company for whatever purpose he chose, and for the benefit of any person he might desire to befriend, regardless of any interest of the corporation in the appropriation, then it is sufficient to say that all the parties were engaged in a criminal conspiracy to loot the company, and this instead of relieving the relator from responsibility would emphasize his offense. It must be remembered that the relator was not a mere clerk or subordinate, to whom the word of the president was law, and whose means of livelihood might be dependent on the president's favor, but a trustee and vice-president of the company, and a member of one of the greatest banking firms in the country. He owed the company the duty, not only of abstaining from participating in any misappropriation of the funds by the president, but of aggressive action against the president to prevent or expose such misappropriation. Surely, no one will pretend that the authority so given the president would have authorized the relator to advance, with the agreement for repayment from the company's funds, \$50,000 to buy a diamond necklace for a woman, and there is nothing wrong in buying a necklace for a woman if a man pays for it with his own money. There is a distinction between the two cases, in that it is even more apparent

in the necklace purchase than in the payment to Bliss, that the expenditure was for a subject in which the corporation had no interest. But the very distinction proves that the authority of the president was not unlimited or unqualified. It is only fair to the relator, however, to say that his claim is not that the authority of the president was unlimited, but his belief that the payment was for the benefit of the company, and, therefore, within the authority of the president.

Something is also said in the opinion below of the beneficent character of the purpose to which the money was appropriated. Of that we can hardly take judicial notice. Probably at all times it would be regarded as beneficent in Vermont and maleficent in Georgia, while in New York its character would vary from year to year. The meritorious character of the object to which the money was appropriated has no bearing on the question of larceny. The gist of that offense is not the application of money to a bad purpose, but taking money that does not belong to the taker to appropriate to an object good or bad. It is the fraudulent deprivation of an owner of his property that constitutes larceny. It is a crime to steal, even though with the intent to give away in charity and relieve distress. (*Regina v. White*, 9 C. & P. 344.) I do not assert that it is immaterial which party is in control of the government of the nation and that the subject is a matter of indifference to the citizen. If this were so, the profession of political faith would be mere hypocrisy. If the citizen, with his own means, contributes to legitimate political expenses to secure the success of the party which he deems will most inure to the welfare of the nation, his action is laudable, and even if the inducement be the belief that the success of that party will inure to the advancement of his personal interest, as distinguished from that of the country at large, it may be justifiable; but to apply the money of another without his consent to such an object is neither laudable nor justifiable, but dishonest. The money given to Bliss belonged neither to the president nor to the relator, but was simply in their custody. Its legal owner was the artificial being, the cor-

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poration; its beneficial owners were the policyholders. With the immense business carried on by the corporation, policies issued in every part of the country and to persons of every political party, both the relator and the president must have well known that the universal assent of the policyholders, the only thing which could have justified, even morally (not legally), the payment to Bliss, could never be obtained and that at all times a substantial minority would be opposed to such payment. But though there was an illegal misappropriation of the corporate funds by the relator this does not necessarily prove that he was guilty of larceny. It may have been simply a trespass for which he is only civilly liable. I agree with Judge GRAY that to constitute larceny there must be what is termed a felonious intent, but we do not make progress towards the determination of the question before us unless we ascertain what is a felonious intent. The question has given rise to much discussion in text books and in judicial opinions. Whether "intent" is the proper term to employ may well be doubted. Though a man may commit many statutory offenses unwittingly, no one can become a thief or an embezzler accidentally or by mistake. To constitute the offense there must be in the perpetrator the consciousness of the dishonesty of the act. This, however, as frequently turns on the knowledge or belief of the party as to his authority as on his intent regarding the disposition of the property. It is not necessary either at common law or under the statute that the intent should be the profit of the taker, for as already said it is theft to take property to give away as well as to keep for oneself. In the present case no one will doubt that had a clerk taken from the company's till a sum of money to give to the Republican club of his ward it would have been larceny. Whatever distinction there may be between the hypothetical case and that of this relator does not lie in the object for which the moneys were appropriated, for that in each case would be the same, but in the difference between the authority over the corporate funds possessed by the mere clerk and by the president and vice-president. The

clerk, of course, would know that he had no authority to so divert the corporate funds; the president and the relator might, though they should have known to the contrary, possibly have entertained a different view on the subject. This brings us to the real and, to my mind, the only question in this case. As has been already said, the relator and the president of the company, without the authority of the corporation and knowing that all the beneficial owners would never assent to the act, took the moneys of the company without consideration and appropriated them to the exclusive use of a third party. The relator must be presumed to have known the law and to have intended the natural consequences of his acts, which were to deprive the company of the money. If he knew the illegality of his act and his intention was solely to benefit either Mr. Bliss personally or the political organization which he represented, then he was guilty of larceny. If, however, as asserted in his statements to the district attorney, he believed that the expenditure would be for the benefit of the company and that the president had the power to make the same, then, however mistaken on the subject, he was not guilty. This was necessarily and properly a question of fact to be determined by the magistrate, not one of law. Though the prosecution put in evidence before the magistrate the written statement of the relator, the magistrate was at liberty to believe it or to reject it in whole or in part. (*People v. Van Zile*, 143 N. Y. 368; *Becker v. Koch*, 104 id. 394; *President, etc., Manhattan Co. v. Phillips*, 109 id. 383.) The indirect method in which the payment to Mr. Bliss was made and the fact concealed by having the money in the first instance advanced by the relator instead of by the company, and the method in which the relator was reimbursed by a check, not to him personally, but to the order of J. P. Morgan & Company, a banking firm with which the corporation may have large legitimate dealings, casts suspicion on the good faith of the relator, and might be considered by the magistrate as militating against him. The explanation of this course offered by the relator, that it was to relieve the president from solicitations from

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other political parties, might also be discredited. It is difficult to imagine how the representatives of other parties would have access to the company's books; nor would the scheme of payment enable the officers of the company when solicited to say that the company had made no contributions to other parties, because such an answer would be as essentially a falsehood as if the money had been paid by the company in the first instance. The concealment of the payment as described would warrant the magistrate in finding that the parties were conscious of wrongdoing in making it and feared exposure. The relator asserts that he was ignorant of the character of the entries made in the company's books, and there is no proof to the contrary of this statement. But he must have known that the check to pay him was drawn, not to himself, but to Morgan & Company. On the other hand, there is, doubtless, to be considered in the relator's favor the fact that he made no pecuniary profit by the transaction and that he afterwards openly admitted his participation in it. All this, however, merely raised a question of fact to be passed on by the magistrate, with whose determination other courts cannot interfere in this proceeding.

In the very recent case of *Tyson v. Bauland* (186 N. Y. 397), which was an action for false imprisonment, the plaintiff, a woman entirely reputable but in the humbler walks of life, was arrested for theft in a department store. The prosecuting witness had placed her bag containing money with other articles on a counter in the store while she was examining goods. The bag was missed. Afterwards the plaintiff was discovered with it going towards the door. She surrendered it to the prosecuting witness, stating that it had been given to her by a woman in another part of the store, who directed her to carry it to a lady whom she would find at the door. On opening the bag it was discovered that the money had been taken therefrom. The plaintiff was arrested, but the grand jury evidently believed her story, for it failed to indict. Thereupon she brought the suit for false imprisonment. We said that the officer was not bound to accept the plaintiff's

explanation, and that on the facts there was probable cause for the arrest, although the plaintiff was in fact innocent. It may be in the present case that the relator's character is so good and his standing so high that either on the examination or on the trial it will seem clear that he could not have consciously and knowingly misappropriated the money of the company. It is also but fair to the memory of the president, who is now deceased, to say that it is entirely possible that his standing and character may appear to have been equally as good. The relator is entitled to the full benefit of the presumption arising from such character when presented at the proper place and before the proper tribunal. But, of course, nothing of that nature appears or can appear in the depositions on which the warrants were issued. However high the standing and character of the relator may be, it does not justify a departure in his case from the same orderly course of procedure in the administration of justice which would be followed in case of the humblest citizen charged with an offense.

As to the questions discussed in the opinion of Judge Hiscock, with the utmost deference to my learned brother I insist that the rule already stated by me of the right of the magistrate to credit part of the statement of the relator and reject the rest, applies with the same force to an admission made out of court and put in evidence by the prosecution as it would to testimony given by the relator on the trial itself. I dissent from the doctrine "that where use is made in a judicial proceeding of a prior declaration the entire declaration at the time made, so far as relevant, must be taken together; a party may not utilize only so much of the declaration as is for his benefit, but he must also admit that which is against his interest and the whole must stand or fall together," though it may be that my brother intends this to be qualified by his subsequent statements. If the proposition is correct, then the action of the district attorney in laying before the magistrate the declaration of the relator was without justification, because he had proof outside of that declaration of the

facts showing the commission of the offense. But I respectfully insist that the law is the reverse. The rule is thus stated by Mr. Greenleaf, referring to admissions made not on the trial: "But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him" (Greenleaf on Evidence, sec. 201); and referring to confessions in criminal prosecutions: "The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing." (Id. sec. 218.) Of course, if the only evidence against a party is his admission or confession then the adverse party cannot rely on the admission without taking the explanation. The cases cited by my learned brother are of that nature. Even that rule, however, is not unqualified, for if the explanation is improbable then it may be rejected, though there is no evidence against the party making it other than the declaration. (*Penfield v. Jacobs*, 21 Barb. 335.) The case of *Kelsey v. Bush* (2 Hill, 440) asserts the principle: "If that part of the confession which discharges the party is in itself highly improbable, or if there be evidence aliunde, *though but slight*, tending to discredit it, the jury may believe one part of the confession and reject the other." In fact, however, under the Code of Criminal Procedure the question can never arise in this bald form in a criminal prosecution, for a conviction cannot be supported by the confession of the defendant without additional proof to show that the crime charged has been committed. (Sec. 198.)

The voluntary character of the admission of the act charged against him is doubtless to be considered on the question of his good faith. But the weight to be accorded it may depend very much on the circumstances under which it was made. If, when the charge was first publicly made that the money

of the company had been appropriated for a political contribution, the relator admitted the fact and justified it, his conduct would be potent, if not conclusive, evidence in his favor. The offense is charged to have been committed in December, 1904. The relator's declaration was made in March, 1906. If, during this interval, there was a complete exposure of the transaction upon evidence taken before some tribunal or legislative body, of such a conclusive character as to render denial futile and unavailing, the voluntary character of the relator's admission might be deprived of its merit. Any clever offender might, under similar circumstances, not unnaturally, adopt the same course. Of the circumstances under which the admission was made we have, however, no knowledge, but on an examination before the magistrate those circumstances would appear.

The case of *McCourt v. People* (64 N. Y. 583) decided no new principle of law. A similar case seems to have arisen as far back as the time of Elizabeth, when a traveler meeting a fisherman, who refused to sell him fish, forcibly took the fish from him but left with him money exceeding their value. (2 East's Pleas of the Crown, 661.) Both cases proceed on the theory that as the party paid or offered to pay more than the value of the goods taken there could be no fraudulent intent. That principle has no relevancy to the present case.

The recent statute prohibiting political contributions by corporations (Laws of 1906, chap. 239), and punishing officers and agents making such contributions as for a misdemeanor does not bear on the question before us. The statute now makes the payment of such contributions criminal, though even every stockholder and every director of the company should expressly authorize and direct it. But returning to the illustration of the clerk taking the money of the corporation from the till to give to his ward club, the statute will not reduce his offense from larceny to a misdemeanor. The charge against the relator is not that he paid the money to Bliss and received it back from the company, by the authority of the

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corporation, but that the payment and repayment were made without that authority.

The order of the Appellate Division should be reversed and that of the Special Term affirmed.

WERNER, J. (dissenting). If the question were whether the relator's guilt of the crime of larceny as charged in the information had been established according to the immemorial rule which obtains in criminal trials, and which imperatively demands proof of guilt beyond a reasonable doubt to justify a conviction, I should unhesitatingly vote in the negative, for the evidence which the magistrate had before him when he was called upon to issue the warrant concededly falls far short of that standard. But that is not the question before us. The only question we are called upon to consider, and indeed the only one we have the right now to decide, is whether the evidence before the magistrate invested him with jurisdiction to issue the warrant; in other words, whether the evidence before him was of such a character as to impose upon him the duty of judicially determining whether there was probable cause to believe that the crime charged had been committed. It is not our province now to inquire whether his decision may have been correct or erroneous, but our duty begins and ends in passing upon his right to decide that question at all. If he had before him any evidence calling for the exercise of his judicial judgment as to whether there was probable cause to believe that the crime charged had been committed, it invested him with jurisdiction, and in that event the writ of habeas corpus issued herein must be dismissed. I think there was evidence enough before the magistrate to give him jurisdiction, and, therefore, vote for reversal of the order of the Appellate Division upon the opinion written by Chief Judge CULLEN.

O'BRIEN and EDWARD T. BARTLETT, JJ., concur with GRAY and HISCOCK, JJ.; CHASE, J., concurs with CULLEN, Ch. J., and WERNER, J.

Order affirmed.

EDWARD W. S. JOHNSTON, as Executor of JOSEPH HUGHES, Deceased, Respondent, v. HENRY HUGHES et al., Respondents, and THE SISTERS OF THE POOR OF ST. FRANCIS, Appellant, Impleaded with Another.

1. WILL — BEQUEST TO HOSPITAL UNDER ERRONEOUS NAME — WHEN BENEFICIARY SUFFICIENTLY DESIGNATED TO ENABLE IT TO TAKE GIFT. Where a testator devised all of his real estate to his executors in trust to sell and dispose of the same and to divide the net proceeds of such sale and give "Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital," such provision is not invalid because there was at that time in the city of New York no hospital of that name, where it appears that there was a hospital building and grounds known to the public as St. Francis Hospital which was owned and conducted by a society incorporated under the name of "The Sisters of the Poor of St. Francis" for "the gratuitous care of the sick, aged, infirm and poor" under a statute (L. 1866, ch. 201) which further provided that "no misnomer of said corporation shall defeat any gift, grant or devise provided the intent shall sufficiently appear that any estate or interest was made to be vested in said corporation," and it is found as a fact by the trial court and conceded upon the argument of this appeal that the testator intended that his devise should be paid over to the trustees of that corporation.

2. SAME — WHEN GIFT TO CHARITABLE ASSOCIATION TO BE ADDED TO FUND FOR CERTAIN PURPOSE, NOT MAINTAINED BY ASSOCIATION, IS VALID AND MAY BE ADMINISTERED BY ASSOCIATION. A contention that the gift was void for the reason that the sisters had never maintained in the hospital a "Blessed Virgin Mary purgatorial fund;" that the only possible object of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory, and that the sisters, as such corporation, had no power to act as trustees for such a fund or purpose, and that it was not for a corporate purpose, is untenable. No trust is created by the will so far as the bequest to the sisters is concerned; there is a devise of real estate to the executors, in trust, coupled with an imperative power of sale, for the purpose of converting the realty into personally, three-fourths of which is to be given by the executors to the sisters corporation; there is no gift to that corporation in trust for any purpose or for the benefit of any person in being; in terms, it is an absolute gift, and testator's statement, that, it is "for the benefit and use of the * * * purgatorial fund of said hospital," does not indicate an intention, on his part, to cut down the gift or deprive the sisters of the control thereof; it merely indicates a purpose, thus making the gift his primary object and

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the use to be made of it his secondary purpose; and while there is no fund for the purpose indicated by testator, as he believed, the sisters corporation is a charitable organization, for "the gratuitous care of the sick, aged, infirm and poor," composed of, and conducted by, sisters of a religious society, so that the use to which testator desired the gift to be devoted is consistent with the object and purpose of the corporation, is included in the powers given to it, and is, therefore, valid.

Johnston v. Hughes, 112 App. Div. 524, reversed.

(Argued January 22, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 1, 1906, which affirmed a judgment of Special Term construing the will of Joseph Hughes, deceased.

The facts, so far as material, are stated in the opinion.

John E. Donnelly, William J. Amend and Alfred J. Amend for appellant. The bequest contained in the will to the "Trustees of St. Francis Hospital" is a valid bequest to the appellant, the Sisters of the Poor of St. Francis. (*N. Y. Inst. for Blind v. How*, 10 N. Y. 84; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *R. D. Church v. Brandow*, 52 Barb. 233; *Matter of Strickland*, 17 N. Y. Supp. 305.) No trust was created by the use of the words "for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital," contained in the bequest. The gift was absolute and vested entirely in the appellant the moment the will took effect. (*Matter of Griffin*, 167 N. Y. 71; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Matter of Strickland*, 17 N. Y. Supp. 305; *Crozier v. Bray*, 120 N. Y. 366; *Hard v. Ashley*, 117 N. Y. 606; *Terry v. Wiggins*, 47 N. Y. 512; *Goodwin v. Coddington*, 154 N. Y. 283; *Clarke v. Leupp*, 88 N. Y. 228; *Clay v. Wood*, 153 N. Y. 134; *Bird v. Merkle*, 144 N. Y. 544; *Matter of Gardner*, 140 N. Y. 122; *Banzer v. Banzer*, 156 N. Y. 429; *Post v. Moore*, 181 N. Y. 15.) It is within the corporate powers of the appellant to take the gift of the testator and use it for corporate purposes, and the object which he desired. (*Le Couteur v. City of Buffalo*, 33 N. Y. 333; *People v. Manhattan Co.*, 9 Wend. 351;

Ketchum v. City of Buffalo, 14 N. Y. 356; *Peterson v. Mayor, etc.*, 17 N. Y. 449; *Vail v. L. I. R. R. Co.*, 106 N. Y. 283, 287; *Gilman v. McArdle*, 99 N. Y. 451; *Est. of Black*, 24 N. Y. S. R. 341; 1 Connoly, 447; *Holland v. Smythe*, 40 Hun, 372; 3 How. [N. S.] 106; *Matter of Hagenmewer*, 12 Abb. [N. C.] 432.)

Edward W. S. Johnston and *Lewis Johnston* for plaintiff, respondent. The bequest to the trustees of St. Francis Hospital is invalid, but even if valid the Sisters of the Poor of St. Francis would not be entitled to take. (*Roseboom v. Roseboom*, 81 N. Y. 356; 15 Hun, 309; *Crain v. Wright*, 114 N. Y. 307; *Robbins v. Robbins*, 9 S. W. Rep. 254; 1 R. S. 784, § 1; *Helmer v. Shoemaker*, 22 Wend. 137; *Jackson v. Robins*, 16 Johns. 538; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Downey v. Borden*, 30 N. J. L. 460; *Jackson v. Coleman*, 2 Johns. 392; *Stuart v. Walker*, 72 Me. 145; *Ide v. Ide*, 5 Mass. 500.)

John H. Rogan for defendants, respondents. There is no such person, natural or artificial, as the "Blessed Virgin Mary Purgatorial Fund," and, therefore, there is no beneficiary in existence. (*Spencer v. D. C. H. L. Assn.*, 36 Misc. Rep. 393.) The St. Francis Hospital cannot take the bequest. It has no corporate or legal existence. (*Matter of Sturges* 28 Misc. Rep. 110; *Pratt v. R. C. O. Asylum*, 20 App. Div. 352.) The defendant, appellant, The Sisters of the Poor of St. Francis, cannot take the bequest because the same is not donated to any of its corporate purposes. (*Fosdick v. Town of Hempstead*, 125 N. Y. 581; *Matter of Crane*, 12 App. Div. 271; *Bird v. Merkle*, 144 N. Y. 544; *Matter of Wolf* 25 Misc. Rep. 469; *Matter of Huss*, 126 N. Y. 537; *Hope v. Brewer*, 136 N. Y. 126; *C. U. Society v. Hale*, 29 App. Div. 400; *O. R. R. Co. v. O. R. R. Co.*, 130 U. S. 1.)

HAIGHT, J. This action was brought to obtain a construction of the last will and testament of Joseph Hughes, deceased.

The testator died on or about the 5th day of May, 1904, at

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his residence in the city of New York, leaving a last will and testament which has been duly admitted to probate. By the third paragraph of his will he gave and devised to his executors all of his real estate in the state of New York, in trust to sell and dispose of the same at public or private sale and to divide the net proceeds of such sale as follows: "Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York, for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital." There is no controversy with reference to the other provisions of the will, and the question presented with reference to this clause pertains to its validity. There was not, at the time in existence in the city of New York, a corporation by the name of The St. Francis Hospital, but there was a hospital building and grounds known to the public as St. Francis Hospital, which was owned and conducted by a society known as The Sisters of the Poor of St. Francis, who, by chapter 201 of the Laws of 1866, was incorporated under that name, having for its object, as stated in that act, "the gratuitous care of the sick, aged, infirm and poor." The act further provided that "no misnomer of said corporation shall defeat any gift or devise, provided the intent shall sufficiently appear that an estate or interest was made to be vested in said corporation." That the defendant, The Sisters of the Poor of St. Francis, was popularly or generally known and designated by the public as St. Francis Hospital, was found as a fact by the trial court and it was conceded by counsel upon the argument of this case that the testator intended that his devise should be paid over to the trustees of that corporation. It was contended, however, on the part of the respondents that the gift was void for the reason that the sisters had never maintained in the hospital a "Blessed Virgin Mary purgatorial fund;" that the only possible object of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory and that the sisters, as such corporation, had no power to act as trustees for such a fund or purpose, and that it was not for a corporate use.

It may be conceded that if the devise was to the sisters in trust for the benefit of others that they, under the statute by which they were incorporated, were not empowered to execute the trust. But we entertain the view that no trust was created by the will so far as the bequest to the sisters corporation is concerned. There was a gift to the executors of the real estate situated in the state of New York, in trust to sell and dispose of at public or private sale, but this was for the sole purpose of division among the persons or corporations designated by the testator. It was an imperative power of sale vested in the executors, thus operating to convert the real estate into personalty for the purpose of division. Three-fourths of the fund so derived from the sale of the real estate was given to the St. Francis Hospital, so called, but which in fact was the sisters corporation. This bequest, as he states in his will, was "for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital." There is no gift to the corporation in trust — no direction for investment or for the payment over of any income or portion of the fund for the use and benefit of any person in being. It is, therefore, quite apparent that no trust was created with reference to the proceeds of the sale of the real estate. As we have seen, there was a gift and devise to the corporation. In terms, it is an absolute gift, but there is added thereto the clause already quoted, for the benefit and use of the Blessed Virgin, etc., which, it is contended, operates to cut down the absolute bequest to a conditional gift limited to a specific purpose, for which the sisters had no power to use it.

In the case of *Clarke v. Leupp* (88 N. Y. 228) TRACY, J., in delivering the opinion of the court, says: "It is well settled by a long succession of well-considered cases that when the words of the will in the first instance clearly indicate a disposition in the testator to give the interest, use and benefit of the estate absolutely to a donee it will not be restricted or cut down to any less estate by subsequent or ambiguous words inferential in their intent."

In *Lumbe v. Eames* (L. R. [10 Eq. Cas.] 267) it is said:

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"Whenever the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention to cut down the absolute gift as the prior part does to make it."

In *Clay v. Wood* (153 N. Y. 134) GRAY, J., says: "Where there is an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show an equally clear intention to do so by the use of words definite in their meaning and by expressions which must be regarded as imperative."

Are the words used by the testator definite in their meaning, showing an imperative intent on the part of the testator not to make the gift absolute? It seems to us not. It says that the bequest is for the use and benefit of the purgatorial fund of the hospital. He merely adds it to the purgatorial fund. He makes no imperative or other direction with reference to the use that should be made of it, but leaves it as the fund of the hospital to be disposed of by the authorities thereof. It turns out that there was no such fund in existence and that the only use that could be made of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory. The fact remains, however, that he thought there was such a fund in charge of the sisters and that he wished his fund to be devoted to a similar use by the sisters, but there is nothing in this that indicates an intention on his part to cut down or deprive the sisters of the control of the bequest. It will be observed that there are no conditional or qualifying words used. Had he made the bequest upon the condition that the sisters should do some specified act inconsistent with their corporate power a different question would have been presented. He has not imposed any conditions whatsoever. He merely indicated a purpose, thus making the gift his primary object and the use to be made of it his secondary purpose. Had he stated the use to be the supplying of clothing to the inmates of the hospital and the sisters had found that it was unnecessary to use it for clothing, but that its use was necessary for the supplying of

food, it would hardly be claimed that the use suggested operated to deprive the bequest of its absolute character and constituted the gift conditional; or even that the diversion of its use to another purpose worked a forfeiture. Should a testator leave to his daughter a sum of money with which to purchase for her use a diamond necklace, the gift would be absolute and vest the money in her, and if she should thereafter choose to invest it in bonds instead of diamonds there would be no cause for complaint that the gift was invalid.

The act incorporating the defendant specifically names a number of sisters, and then states that their associates and successors shall constitute a body corporate and politic. The successors are to be chosen from the society of The Sisters of the Poor of St. Francis. It is a matter of common knowledge that this is a religious society connected with the Roman Catholic church. It appears from the testimony of Sister Josephine, the secretary of the corporation, that there is a chapel connected with the hospital, in which they have morning mass and religious devotion during the day, in which prayers are offered for departed souls. We, therefore, have a charitable corporation organized for the gratuitous care of the sick, aged, infirm and poor to be conducted by the sisters of a religious society. In considering its powers we should give to the provisions of the act a fair and reasonable interpretation, such as was evidently contemplated by the legislature in constituting the sisters a body corporate. The gratuitous care of the sick, aged, infirm and poor call for the exercise of many powers not specifically named. The powers of the corporation are those which are included in those specifically granted, which are necessary or essential to the fulfillment of the purpose for which it was created. It authorizes the doing of that which adds to the comfort and welfare of the persons under the charge of the sisters. It not only includes the supplying of food, clothing, medicine and nursing, but may also properly include the providing of means for physical exercise, the occupation of the mind and the administering of religious consolation to the inmates who

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are about to close this life. It is quite possible that the sick, aged and infirm persons in this hospital derive great comfort and peace of mind from the knowledge of the fact that the sisters daily offer prayers in the chapel for departed souls, and that such prayers will be continued for their benefit after they have passed away. The mind has an important influence upon the body, and it is not for this court to say that such consolation and peace of mind may not be beneficial to them physically and tend to prolong their lives. The supplying of books and papers to those who could read in the hospital, by which they may occupy their minds and pass their time, would not be foreign to the purposes of the corporation, but instead it would be an act tending to promote their welfare; and if this be so, may not also the consolation derived from the religious instructions and prayers of the sisters also add to the physical comfort and welfare of these beings? We fail to see why the provisions of this will as to the use of the bequest by the sisters is not fairly within the legislative intent, one of the powers under the incorporation which these sisters might properly exercise in their gratuitous care of the sick, aged, infirm and poor. In this case the bequest was to a corporation duly organized, and it is not, therefore, subject to the objection that was made in the case of *Holland v. Alcock* (108 N. Y. 312), but is rather in accordance with the spirit of that decision. In *Le Conte v. City of Buffalo* (33 N. Y. 333) it was held that a corporation is not limited to the exercise of the powers specifically granted, but possesses in addition all such powers as are either necessarily included in those specified or essential to the purposes and objects of its corporate existence. In *Matter of Griffin* (167 N. Y. 71) there was a bequest to the Round Lake Association of the Methodist Episcopal Church, to be prudently invested by the association and the income and profits arising therefrom to be devoted and applied to the support and maintenance of the school known as The Round Lake Summer Institute, and yet it was held that the gift was absolute to the Round Lake Association and was valid. In *Bird*

v. *Merklee* (144 N. Y. 544) there was a bequest to a Methodist church for the purpose of buying coal for the poor members of the church. Such power was not specifically provided in the articles of incorporation, but it was held that the power was included and the gift was absolute and valid.

We, therefore, conclude that the use to which he desired the fund devoted is consistent with the object and purpose of the corporation, included in the powers given to it, and is, therefore, valid.

The judgments of the Appellate Division and Special Term should be reversed and judgment ordered for the appellant declaring the bequest valid, with costs payable out of the fund to all parties appearing in this court by separate attorneys and filing briefs.

CULLEN, Ch. J., WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; GRAY and EDWARD T. BARTLETT, JJ., dissent.

Judgment accordingly.

CHARLES GRIFFEN et al., as Trustees under the Will of SAMUEL WILLETS, Deceased, Respondents, v. WILLIAM L. KEESE et al., Defendants, and MARY W. PELL-HAGGERTY, Appellant.

1. JUDGMENT—RES ADJUDICATA. Where a second suit, although between the same parties, is upon a different cause of action, a judgment is not conclusive as to all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein.

2. SAME. A surrogate's decree, in a proceeding for the settlement of executors' accounts, that an annuity fund as then proposed to be constituted by trustees under the will was proper and reasonable to produce the annuities required, from which no appeal was taken, is *res adjudicata* upon the reasonableness of the amount at that time as to all parties to the proceeding and their descendants. A subsequent judgment in an action for a construction of the will, that one of such descendants, made a party to the action, was not entitled to any share in the distribution of the annuity fund as such, and the unappropriated income thereof, either theretofore made or thereafter to be made, in which the question as to the reasonableness of the amount of the fund was not raised and from which no appeal

was taken, is *res adjudicata* upon that issue. While, therefore, such descendant cannot attack the validity of the fund as established by the decree and continued by the judgment, and is prevented from claiming any share in the distribution of the annuity fund as such and the unappropriated income thereof, she may, in a subsequent action for the construction of the will, insist that the annuity fund, which is concededly in excess of that required to produce the annuities, be reduced to a proper amount, and that the excess, together with the unappropriated income thereof, be transferred to the residuary estate in which she has an interest.

8. WILL—TRANSFER TO RESIDUARY ESTATE OF AMOUNT IN EXCESS OF THAT REQUIRED TO PRODUCE ANNUITIES. A testamentary direction to executors to "set apart and invest a fund sufficient to produce the above annuities, or a sufficient amount of stocks to be held for that purpose or a part of each, which fund and the unappropriated income thereof is on the decease of the annuitants as they respectively die to be divided among my grandchildren who shall be living at the time of the death of the respective annuitants, *per capita* and not *per stirpes*, only retaining an amount sufficient to produce the required amount for the remaining annuitants," considering the plain language used and the surrounding circumstances, authorizes the reduction of the annuity fund created by the testator, when it is larger than necessary to produce the surviving annuities, to a proper amount for that purpose, and the transfer of the excess together with the unappropriated income thereof, to the residuary estate.

Griffen v. Keese, 115 App. Div. 264, modified.

(Argued February 1, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 22, 1906, which modified and affirmed as modified a judgment of Special Term construing the will of Samuel Willets, deceased.

On the 6th day of February, 1883, Samuel Willets died a resident of this state, leaving a will and two codicils, which were duly admitted to probate on the 26th day of February, 1883, and by which the testator disposed of a very large estate to many different persons and institutions in various amounts, directly or in trust. He created a number of annuities, aggregating the sum of \$10,000 per annum, and for the purpose of erecting an adequate fund for their production he provided as follows: "And I direct that my executors do set apart and invest a fund sufficient to produce the above annui-

ties, or a sufficient amount of stocks to be held for that purpose or a part of each, which fund and the unappropriated income thereof is on the decease of the annuitants as they respectively die to be divided among my grandchildren who shall be living at the time of the death of the respective annuitants, *per capita* and not *per stirpes*, only retaining an amount sufficient to produce the required amount for the remaining annuitants."

By a residuary clause in the will the testator gave to his executors all the residue of his estate in trust, with directions to convert the same into cash which was to be divided into five shares, one of which was to be invested in bonds and mortgages for the benefit of each of the testator's grandchildren, with absolute remainder over to his or her surviving lawful issue, if any, and to the survivors of the testator's grandchildren upon the death of any of them without issue.

The residuary clause was modified by the second codicil, in which the testator declares that in consequence of having made ample provision in other parts of his will for his granddaughter Amelia W. Leavitt and her issue, he revokes so much of the residuary clause as applies to said granddaughter, and directs the division of the residuary estate among the testator's other four grandchildren, their issue or survivors, in accordance with the provisions of the residuary clause.

Of the thirteen annuitants who were the objects of the testator's bounty only twelve survived the testator, and their annuities aggregated \$9,500 per annum, while there were only eight of the annuitants living at the time of the commencement of this action in June, 1904, and their combined annuities required a net annual income of \$5,400 per annum, which has since been reduced to \$5,200 by the death of the annuitant Thaddeus Rich. Other facts appear in the opinion.

Charles F. Brown and *Samuel J. Benson* for appellant. The question presented upon this appeal has not been decided in any previous litigation between the parties. (*Stokes v. Foote*, 172 N. Y. 327; *Bell v. Merrifield*, 109 N. Y. 202;

Black on Judgments, § 610; *Bowditch v. Ayrault*, 138 N. Y. 222, 231; *Matter of Hoyt*, 160 N. Y. 607; *Matter of Haight*, 51 App. Div. 310.)

Wilson M. Powell for plaintiffs, respondents. By the will the executors were to set apart and invest a fund sufficient to produce the annuities. They were vested with a discretion as to the amount. They have exercised such discretion and have set apart \$400,000, by and with the advice and direction and decree of the surrogate. This amount was, therefore, judicially settled, and no appeal therefrom having been taken, the matter is *res adjudicata*. (*Frame v. Willets*, 4 Den. 368; *Matter of Willets*, 5 Den. 342; 112 N. Y. 289.)

Henry A. Forster and *Frederick P. Forster* for Edward R. Willets et al., defendants, respondents. The judgment in *Griffen v. Willets* is *res adjudicata* that Mrs. Pell-Haggerty is not entitled to any part of the principal or unappropriated income of the annuity trust fund. (*Thorn v. De Breteuil*, 179 N. Y. 64; *Pray v. Hegeman*, 98 N. Y. 351; *Cline v. Sherman*, 144 N. Y. 601; *Leavitt v. Wolcott*, 95 N. Y. 212; *Lindo v. Murray*, 157 N. Y. 697; *P. H. Co. v. Herriot*, 41 App. Div. 324; *Kendall v. Hardenberg*, 94 Fed. Rep. 911.) The decree of the Surrogate's Court, upon the executors' accounting, entered in April, 1885, upon notice to all the parties hereto or their predecessors, was an adjudication that the sum of \$400,000 should be set aside by the plaintiffs as and for the principal of the annuity trust fund, to be held and applied by them under the provisions of the will relating to that fund. The circumstance that after the decree has stood for twenty years, the Mortgage Tax Law has doubled the income producing power of the annuity trust fund, and that the increased age of the surviving annuitants has reduced the value of their annuities, does not entitle Mrs. Pell-Haggerty, whose father, Frederick Willets, was a party to the decree, to divest the vested rights of the remaindermen in the corpus of the annuity trust fund by claiming that any part of the corpus

of that trust fund should now be diverted into the residuary estate. (*Jewett v. Schmidt*, 83 App. Div. 276; 108 App. Div. 322; 184 N. Y. 608; *Cline v. Sherman*, 144 N. Y. 601; *Douglas v. Cruger*, 80 N. Y. 15; *Lent v. Howard*, 89 N. Y. 171; *Cuthbert v. Chauvet*, 136 N. Y. 326.)

John L. Cadwalader, George Coghill and Edward E. Sprague for Amelia W. Leavitt, defendant, respondent. The testator confided to the discretion of his executors to decide and set apart what amount would be sufficient to devote to the payment of the annuities. That discretion having been honestly exercised will not now be interfered with by the court. (*Morse v. Tilden*, 35 Misc. Rep. 560.) The testator clearly intended that no part of the annuity trust fund should ever pass from that trust to the residuary trusts. (*Cochrane v. Schell*, 140 N. Y. 516; *U. S. T. Co. v. Soher*, 178 N. Y. 442; *Mason v. Jones*, 2 Barb. 229; *Jewett v. Schmidt*, 83 App. Div. 276.)

WERNER, J. In form this is an action by the trustees to procure the judicial adjustment of their accounts and to obtain judicial construction of certain clauses of the will from which they derive their powers. In substance it is a contest between the testator's grandchildren and the daughter of a deceased grandchild over the distribution of a portion of the estate which has thus far constituted a part of the annuity fund referred to in the foregoing statement of facts, and which has been decided by the courts below to belong to the surviving grandchildren of the testator, as against the surviving great-grandchild who claims under the residuary clause of the will. The precise point and scope of the present controversy will be made manifest by the statement of some additional facts which form a part of the history of the administration of this estate.

In 1885 the executors who had qualified presented their accounts to the surrogate for settlement. All the parties in interest were then before the court. In that proceeding it was

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decreed that the executors "pay to themselves, as trustees, the sum of Four hundred thousand dollars as a fund sufficient to produce the several annuities provided for in said will * * * to be held and applied by them under the provisions of said will relating to said fund." At that time the residuary legatees objected that the fund was larger than was necessary to produce the annuities, and the executors asserted that in view of the contingencies of taxation and the fluctuations of interest rates, it could not safely be made smaller. The surrogate adopted the view of the executors and fixed the amount of the fund as above stated. No appeal was taken from this decree, and the executors paid over to themselves as trustees of the annuity fund the sum of four hundred thousand dollars.

Thus matters stood in 1886 when the trustees had presented their annual account in a proceeding in which again all the parties in interest were present or represented. In that proceeding the residuary legatees had again contended that the annuity fund was larger than was necessary to produce the annuities, and again the surrogate had overruled the contention, but apparently upon the ground that the question could only be passed upon in a proceeding instituted for that express purpose. An appeal to the General Term in the first department (44 Hun, 629) resulted in an affirmance of that decree, and then the case came to this court (112 N. Y. 297), where the question was considered as being directly involved. In speaking for the court, the late Judge EARL said: "It is further claimed that the \$400,000 set apart to raise the annuities is too large a sum, and that a portion of it should be restored to the residuary fund. It was the duty of the trustees to set apart a sufficient sum to produce the annuities, and the fund should be so large as to provide against all reasonable contingencies and to make sure that it would produce a sufficient sum to pay the annuities. The surrogate, on the accounting of the executors, determined that the \$400,000 should be set aside for that purpose. That determination has never been appealed from, and cannot now be reviewed or reversed upon

appeal. But even if it could be, we would feel indisposed to interfere with it. If experience shall in the future demonstrate that the fund is more than sufficient to produce the annuities, the trustees are still under the control of the courts, and may, by proper action of the surrogate or of some other court, be compelled to reduce the amount and restore a portion thereof to the residuary fund."

In 1897 the plaintiffs, as trustees, commenced an action in the Supreme Court against the present appellant and all other persons in interest for an accounting and a further construction of the will. The reasons for the suit seem to have been that a number of the annuitants had died, the most recent decedent having been Sarah A. Willets, and that Mrs. Pell-Haggerty, the present appellant, was claiming, or might claim, a share in that part of the annuity fund which had become distributable by reason of that death. The complaint in that action contained an allegation to the effect that the trustees were unable to determine whether the present appellant was entitled to any share in that portion of the annuity trust fund and the unappropriated income thereof then in their hands, which became distributable upon the death of Sarah A. Willets, and prayed for an adjudication in that behalf. In the answer of the present appellant she submitted her rights to the court. The case was brought to trial before the late Mr. Justice BEEKMAN, who rendered his decision in January, 1898, in which he found as one of his conclusions of law "that the defendant Mary W. Pell-Haggerty, the only child and next of kin of said Frederick Willets, deceased, is not entitled to any share in that portion of the principal of said annuity trust fund and the unappropriated income thereof now in the plaintiff's hands, which became distributable upon the death of said Sarah A. Willets, and that she is not entitled to the portion thereof which her father, the said Frederick Willets, would have been entitled to if he were living, and that the issue, or children, or personal representatives, or assigns of either of the five grandchildren of the testator are not, and will not be entitled to share in any distribution hereafter to

be made of any part of the principal or unappropriated income of the said annuity trust fund, so long as either of said five grandchildren survive. But that the said portion of said principal and the unappropriated income thereof shall be divided and paid over to the survivor or survivors of the said five grandchildren as directed in said will." This conclusion is reproduced in, *hæc verba* in the recitals of the judgment or decree, but is not repeated in the adjudication clauses which simply specify the details of the distribution which result from the legal conclusion. No appeal was ever taken from that judgment which was entered of record on the 28th day of January, 1898.

Since that time the deaths of two other annuitants have intervened, and again the trustees have brought suit to have their accounts passed upon, and to ask the court for instructions as to the further distribution of such portions of the annuity fund and its unappropriated income as became distributable by the death of the annuitant Annie T. Shotwell before the commencement of this suit, and by the death of the annuitant Thaddens Rich, which occurred *pendente lite*. In their complaint the trustees set forth the various deaths that have reduced the number of the annuitants, the several distributions that have taken place, and then they allege "that the said sum of Four hundred thousand dollars has, in point of fact, been more than sufficient to produce the annuities required by said will, and there has been a surplus of income from said annuity fund which has also been divided from time to time pursuant to the terms of the will." The defendant appellant interposed an answer admitting that the annuity fund had been larger than necessary to produce the annuities provided for in the will; alleging that various distributions have been made as annuitants have died; alleging, further, that there is still in the fund an excess of principal over what is necessary to take care of the surviving annuities, as well as a considerable surplus of unappropriated income, and that the trustees can safely restore to the residuary fund a considerable sum of such principal and unappropriated

income. Such sum, the answer suggests to the court, should then be divided into four parts or shares, one of which should be awarded to the appellant as one of the four surviving residuary legatees. The case was brought to trial before Mr. Justice McCALL at Special Term, who decided that the sum of \$271,017.21, which was the amount in the annuity fund at that time, is larger than necessary to provide for the payment of the remaining annuities, and that it could safely be reduced to \$100,000, but that the surplus or excess beyond the last-mentioned sum should be divided among the four surviving grandchildren of the testator, in accordance with the terms of the annuity clause of the will, and not among the residuary legatees. An appeal to the Appellate Division resulted in a modification of the judgment entered upon the decision of Mr. Justice McCALL, by fixing the annuity fund at \$150,000 instead of \$100,000, and as thus modified the judgment was affirmed.

These extracts from the history of the case render it evident that the decision of the very narrow question brought up by this appeal depends: 1. Upon the effect of the previous decisions of the various tribunals in which the different proceedings above recited have been carried on. 2. Upon the proper construction of the annuity clause in the testator's will if none of the previous decisions are binding upon us as *res judicata*.

The respondents contend that the surrogate's decree of 1885, and the judgment in the Supreme Court action of 1897, are both *res judicata*, while the appellant insists that neither of these adjudications is binding in the litigation at bar, in which the question now at issue has for the first time been raised and decided. It is our view that neither of these contentions can be wholly sustained. In the decree of 1885 the surrogate decided that the sum of \$400,000 was a proper fund to be set apart by the trustees for the production of the annuities created by the testator. That was a question raised by the objections of the residuary legatees, and one which, being necessarily involved in the accounting, the surrogate

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had the jurisdiction to determine. That decree is binding upon all the parties and, so far as it affects the *res*, upon all the world, in every tribunal where the same question is sought to be litigated by the same parties or their privies. All that was decided by the surrogate in 1885 was that the fund as then proposed to be constituted by the trustees was proper and reasonable to produce the annuities. That was the view of this court when, upon an appeal from another decree, it was declared that the decree fixing the amount of the annuity fund in 1885, which had not been appealed from, was a binding adjudication and would remain so until some court having control of the trustees and of the subject-matter should change the amount of the fund. (*Matter of Willets, supra.*) That is what was decided and nothing more. To that extent the decree is binding and no further.

The legal status established by the decree of 1885 remained unchanged when the Supreme Court action of 1897 was commenced. Frederick Willets, one of the grandchildren of the testator having died in 1895, and the question having arisen whether his daughter, the present appellant, was entitled to her father's share in that part of the annuity fund and its unappropriated income which became distributable upon the death of Sarah A. Willets, one of the annuitants who had died in July, 1896, the trustees commenced the action for an accounting that has been referred to, and it was therein decided, among other things, that the present appellant was not entitled to any share in that portion of the annuity fund or the unappropriated income that was then distributable. That is the express purport of one of Mr. Justice BECKMAN's conclusions of law, and that is the necessary effect of the judgment entered thereon, which directs distribution in accordance with that conclusion. That judgment is to be interpreted in the light of the circumstances then existing, the issues then raised, and the attitude of the then defendant, the appellant in the case at bar. No change had been made in the annuity fund except such as had been wrought by the distributions of principal and unappropriated income, as death

had reduced the number of annuitants. The only issue raised and litigated was whether the defendant Haggerty and the issue, children, personal representatives or assigns of either of the five grandchildren of the testator, were entitled to share in that portion of the annuity fund or its unappropriated income which had become distributable by the death of the annuitant Sarah A. Willets; or in any distribution thereafter to be made so long as either of said grandchildren should survive. The controversy was confined to the disposition of the annuity fund, as such, and it embraced nothing else. There was in the complaint of the trustees no suggestion that the annuity fund was larger than necessary to produce the surviving annuities, and the answer of the defendant Haggerty simply submitted her rights to the court. As to the issue actually decided the judgment in that action is *res judicata*, but it cannot have that effect upon a question which was not then involved and, for aught we know, had not yet then arisen. (*Stokes v. Foote*, 172 N. Y. 327.) Neither the record, nor any extrinsic evidence brought to our attention, shows that the question now before us was in fact litigated in the action of 1897. The burden of making this proof rests upon the respondents who rely upon the plea of *res judicata*, and any uncertainty as to what has actually been litigated must inure to the benefit of the appellant. (*Bell v. Merrifield*, 109 N. Y. 211.)

It has been sometimes stated to be the general rule that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which might have been litigated and decided in the same suit. This is doubtless true of all matters properly belonging to the subject of the controversy and within the scope of the issues. But that is not the rule when the second suit, although between the same parties, is on a different cause of action. In such a case the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein. (*Cromwell v. Sac Co.*, 94 U. S. 351.)

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The issue in the suit of 1897 was whether the defendant Haggerty, the present appellant, was entitled to share in the distribution of the annuity fund and its unappropriated income; the issue in the action at bar is whether the annuity fund can be reduced and a portion thereof, together with the unappropriated income, transferred to the residuary estate. There might have been no good reason for urging the reduction of the annuity fund in 1897; while to-day its excessiveness is a conceded fact. The judgment of 1897 is, therefore, binding upon the appellant only to the extent of precluding her from attacking the validity of the annuity fund as constituted in 1885, as continued under the judgment of 1897, and from claiming any share in the distribution of the annuity fund, *as such*, and the unappropriated income thereof, either theretofore made, or thereafter to be made. To that extent the judgment of 1897 is *res judicata*, for those were the precise issues litigated and necessarily decided. (*Rudd v. Cornell*, 171 N. Y. 128.)

In the action at bar the courts are now, for the first time, confronted with the direct question whether the annuity fund created by the testator, which is concededly larger than is necessary to produce the surviving annuities, can be reduced to a proper amount, and the excess transferred to the residuary fund; or whether the annuity fund, having been once fixed, can never be changed no matter how excessive it may be. In view of what we have said as to the effect of the former judgments, we may now consider that question in the light of the language of the will. Having created a number of annuities the testator found it necessary to create a fund for their production. His executors were, therefore, directed to set apart and invest "a fund sufficient to produce the above annuities." Not an unlimited fund; not an excessive fund; but a *sufficient fund*. The production of these annuities is the underlying subject-matter of this part of the will. That is the evident purpose of this clause. That is the obvious reason for the fund. The distribution of this fund was clearly not the primary object of its creation; that was to be a mere

incident, because the death of the annuitants, from time to time, would be sure to reduce the income that was necessary, and that would operate to release a part of the fund. The testator's direction as to the establishment of the fund was practically reiterated as to its subsequent maintenance, for the trustees are admonished to retain only "an amount sufficient to produce the required amount for the remaining annuitants." So much for the annuity clause, considered upon its own clear language. When we pass from that to take a view of the testator's personality, the extent of his vast fortune and the minuteness and variety with which he provided for its disposition among the many objects of his bounty, we see even more plainly that it could not have been his intention to create a fixed and immutable fund. He could easily have named the amount to be set aside as an annuity fund, but he did not do it. He left that to the good judgment and discretion of his executors. They established a fund which, at that time, was proper and sufficient, taking into account the then prevailing rates of interest and the then existing methods of taxation. We entertain no doubt that if the fund, as established, had proven too small to carry out the testator's directions, the executors could have drawn upon the residuary estate to make it large enough, for the residuary estate was to consist only of what remained after the testator's specific directions had been complied with. Logically and reasonably, the converse of that proposition must be sound. Whenever the fund proved to be too large for the real purpose of its creation, either the trustees or the residuary legatees could apply to the court for its reduction, and the transfer of the excess or surplus to the residuary estate, where it properly belongs. Such a situation has now arisen. The trustees come into court alleging that the fund is too large. The appellant, as one of the residuary legatees, admits that this is true. No one denies it, and the trial court finds it to be a fact. Under these circumstances, we think that equity and justice justify the conclusion that the annuity fund may be reduced to a proper sum, and the excess above that sum, as well as the

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unappropriated income thereof in the hands of the trustees, may be transferred to the residuary estate, to be disposed of in accordance with the provisions of the residuary clause of the testator's will, as modified by the second codicil thereto.

As the judgment disposes of a number of matters to the entire satisfaction of all the parties concerned, and this appeal relates solely to the disposition of the annuity trust fund, our conclusion must result in a modification of the judgment, as modified and affirmed at the Appellate Division, by directing that the matter be remitted to the Supreme Court for the purpose of rendering judgment, that all of the annuity fund and its unappropriated income in excess of \$150,000, that being the sum fixed by the Appellate Division, shall be transferred to the residuary fund for distribution according to the residuary clause of the testator's will, as modified by the second codicil thereto; that the Special Term further take such proofs as may be necessary to ascertain and determine what share the defendant, appellant, Mary W. Pell-Haggerty, may be entitled to in that part of the annuity fund withdrawn and transferred to the residuary estate; that the Special Term take such further proofs and give such further directions in the premises as may be necessary in view of our decision. As thus modified the judgment of the Appellate Division should be affirmed, with costs to the appellant to be paid out of the estate.

GRAY, J. (dissenting). The judgment appealed from was right and just, and it should be affirmed. To reverse it will be, in my opinion, to defeat the only presumable intention of the testator. By the provision of his will under consideration, he directed the creation of a fund for two purposes. It was, in the first place, to provide for the payment of annuities to certain persons named and, in the second place, it was to belong to those members of a class described, who might be living at the death of each annuitant, when a portion would be released. That was the plain meaning of the careful language used, that "my executors do set apart and invest a

fund sufficient to produce the above annuities, or a sufficient amount of stocks to be held for that purpose, *which fund and the unappropriated income thereof* is, on the decease of the annuitants as they respectively die, *to be divided among my grandchildren* who shall be living at the time of the death of the respective annuitants," etc.

Words cannot express more clearly that the executors were invested with a discretion as to the amount of the fund and that such fund, when it came into existence by their act, was intended to benefit, ultimately, the class of grandchildren, or the survivors of the class. Of course, there can be no pretense that the executors abused their discretion in setting apart a fund of \$400,000; for their act was confirmed by the court and the decree directing it was not appealed from. (*In re Willets*, 112 N. Y. 289.) It was, then, settled for all time that the sum of \$400,000, so set apart, constituted the principal of a trust fund for the annuitants and belonged in remainder to such of the grandchildren as might survive, according to the terms of the clause. It was a valid trust. (*Cochrane v. Schell*, 140 N. Y. 516-533.) It was no longer a part of the general estate and was as much withdrawn from the residuary estate as though the testator had, himself, fixed the amount of the fund, instead of leaving it to the discretion of his executors to fix. The ultimate right to its possession as, from time to time, by the decease of annuitants, portions not needed to feed the existing annuitants were distributable, vested at once in the grandchildren, subject only to the contingency that one or more might fail to survive. This view is enforced by a further consideration that, in disposing of his estate, the testator, at first, after creating the trust for the annuities, had divided his residuary estate into five trusts, one for each of his grandchildren with remainder to his, or her, issue. Subsequently, however, by codicil, the trust for Amelia Leavitt, one of the grandchildren and a respondent here, was revoked; so that she thereby is remitted to what shall come to her upon the division of the annuity trust fund. Was that a fluctuating and variable interest? It is

quite difficult to understand how the trust fund could, in reason, be so regarded. As soon as it came into existence, the provisions of the will became operative upon it; which is to say, that the five grandchildren, then, became vested with remainders in it, conditioned upon survivorship. Shall the court now hold that this was not their right and deprive them of it, simply, because of the happening of circumstances in the twenty years which have elapsed since the amount of the fund was fixed by the executors and set apart by the decree? This is a proposition which I only consider with gravity, because approved by some of my associates.

But I think, further, that the doctrine of *res judicata* is properly invoked by the respondents in support of their contention. In every material point, the questions have been settled by prior adjudications. The decree of the surrogate upon the executors' accounting, in 1885, which fixed the trust fund at \$400,000, was never appealed from and all parties in interest were before the court. In March, 1897, the plaintiffs brought an accounting and construction suit, to have it determined, among other things, whether Mrs. Pell-Haggerty (this appellant) was "entitled to share in that portion of the principal of the said annuity trust fund, and the unappropriated income thereof now in the plaintiffs' hands, which became distributable upon the death of a deceased annuitant * * * and that the said clause in the said Will concerning the said annuities and fund created therefor be construed by this Court in this action." This appellant, Mrs. Pell-Haggerty, answered, claiming whatever rights in the estate "or in the principal of the annuity trust fund" she might be entitled to. The judgment was: "That the defendant Mary W. Pell-Haggerty * * * is not entitled to any share in that portion of the principal of the said Annuity Trust Fund and the unappropriated income thereof, * * * which became distributable upon the death of said Sarah A. Willets, and that she is not entitled to receive the portion thereof which her father, the said Frederick Willets, would have been entitled to if he were living, and that the issue or children or

personal representatives or assigns of either of the five grandchildren of the testator are not, and *will not be, entitled to share in any distribution hereafter to be made of any part of the principal or unappropriated income of the said Annuity Trust Fund, so long as either of said five grandchildren shall survive*; but that the said portion of said principal and the unappropriated income thereof shall be divided and paid over to the survivor or survivors of said five grandchildren, as directed in said will." That judgment was not appealed from and, as a construction of this provision of the will, determining the persons entitled to share in any distribution of the principal or unappropriated income in question, it is *res judicata*. To claim, because the contention, now made upon this accounting by the executors, is that the principal of the fund should be reduced and the portion, not adjudged to be needed, transferred to the residuary estate, that the prior judgment is not binding seems to me to be trifling with a serious question. The prior judgment construed the will and adjudged the principal and unappropriated income to belong to the grandchildren as they might survive. It adjudged that there was an Annuity Trust Fund and who were the beneficiaries in remainder of that fund. Now, this judgment was subsequent to the decision in *In re Willets*, (*supra*), which was upon an accounting by the executors, in 1886. I do not consider the dictum of Judge EARL in that case to be authoritative as to the right to bring an action to reduce the amount of the Annuity Trust Fund. He had held, as to the determination of the surrogate setting apart that fund, that "it has never been appealed from and cannot now be reviewed or reversed upon this appeal. Even if we could," he continued, "we would feel indisposed to interfere with it." What he observed, as to what might be done in the future upon the subject of a reduction of the amount of the fund, was merely suggestive. But, if we give it weight, certainly its authority ceased when, twelve years afterward, the action to construe the will and to have this appellant's interest determined, resulted in the judgment

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which I have referred to. The opportunity, at least, was then and there, and all the parties were represented; but the judgment was never appealed from. The court was rendering its judgment upon the present and future disposition of the specific fund before it and adjudged that this appellant had no interest in it.

HAIGHT, VANN and WILLARD BARTLETT, JJ., concur with WERNER, J.; CULLEN, Ch. J., and CHASE, J., concur with GRAY, J.

Judgment accordingly.

In the Matter of the Accounting of FREDERICK H. STEVENS et al., as Trustees under the Will of JULIA A. BROOKS, Deceased.

JESSE B. NICHOLS et al., Appellants; FREDERICK H. STEVENS et al., as Trustees et al., Respondents.

TRUSTS—WHEN TESTAMENTARY FUND INVESTED IN SECURITIES AT A PREMIUM MUST BE KEPT INTACT BY DEDUCTION OF INTEREST. Where trust funds are invested by a testamentary trustee in bonds having a term of years to run and purchased at a premium, in the absence of a clear direction in the will to the contrary, such a proportionate deduction should be made from the nominal interest as will, at the maturity of the bonds, make good the premiums paid and thus preserve the principal of the fund intact; a surrogate's decree, therefore, in a proceeding settling the trustee's accounts awarding to a life tenant as income the whole amount of the interest coupons is erroneous.

Matter of Stevens, 111 App. Div. 778, modified.

(Argued January 7, 1907; decided February 26, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 7, 1906, which affirmed a decree of the Chautauqua County Surrogate's Court settling the accounts of the trustees herein.

The facts, so far as material, are stated in the opinion.

Clare A. Pickard for Jesse B. Nichols, appellant. The fair and reasonable construction of the language of this will

—the language which expresses the intention of the testatrix — demands that all earnings of the stock embraced in the trust as fast as it is released from its corporate control, shall be paid over to the life tenant as “dividends, issues and profits.” (*Thorn v. De Breteuil*, 179 N. Y. 64; *Haskall v. King*, 162 N. Y. 134; *McLouth v. Hunt*, 154 N. Y. 179; *Lowry v. F. L. & T. Co.*, 172 N. Y. 137.)

John Ewen for Jessie V. Tyler, appellant. Unless a contrary intention can be inferred from the language of the trust instrument in connection with the surrounding circumstances, deductions should be made annually from the interest received on trust securities to cover depreciation in their value caused by the wearing away of premiums paid at the time of their purchase. (*N. Y. L. Ins. & T. Co. v. Baker*, 38 App. Div. 417; 165 N. Y. 484; *N. Y. L. Ins. Co. v. Kane*, 17 App. Div. 542; *People ex rel. Cornell v. Davenport*, 30 Hun, 177; 117 N. Y. 549; *McLouth v. Hunt*, 154 N. Y. 179; *Matter of Hoyt*, 160 N. Y. 607; *Lynde v. Lynde*, 113 App. Div. 411.)

George A. Lewis for trustees, respondents. The entire proceeds of the sale on June 20, 1901, of the business, plant, materials or other property, tangible or intangible, of the Brooks Locomotive Works to the American Locomotive Company represent principal and not income to the stockholders of the Brooks Locomotive Works. (*Matter of Kernochan*, 104 N. Y. 618; *Thorn v. De Breteuil*, 86 App. Div. 405; 179 N. Y. 64; *Matter of Nesmith*, 140 N. Y. 609; *Matter of Proctor*, 85 Hun, 572; *Matter of Gerry*, 103 N. Y. 445; *Stewart v. Phelps*, 71 App. Div. 91; *Matter of Curtis*, 29 N. Y. S. R. 217; *Matter of Skillman*, 24 Abb. [N. C.], 41; 9 Am. & Eng. Ency. of Law [2d ed.], 717-719; *Matter of Roberts*, 40 Misc. Rep. 512; *People ex rel. v. Roberts*, 159 N. Y. 70.) In view of the provisions of the will of the testatrix, and the situation of her legatees and the beneficiaries and remaindermen under the trusts created by said will, it is not the duty of the trustees to maintain a sinking fund for the

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extinguishment of premiums paid upon bond purchases. (*McLouth v. Hunt*, 154 N. Y. 179; *Matter of Hoyt*, 160 N. Y. 607; *N. Y. L. Ins. & T. Co. v. Baker*, 165 N. Y. 484; *Matter of Johnson*, 57 App. Div. 494.)

John Ewen for Jessie V. Tyler, respondent. It was the intention of the testatrix that the trust fund should be kept intact until the life beneficiaries should severally arrive at the age of thirty years, and the dividends representing the price received upon the sale of the business of the Brooks Locomotive Works are not income within the meaning of the will. (*Lowry v. F. L. & T. Co.*, 172 N. Y. 143; *Kiah v. Grenier*, 56 N. Y. 220; *Van Nostrand v. Moore*, 52 N. Y. 21.) When a corporation in whose stock trust funds have been invested goes into liquidation and distributes all of its property in the shape of dividends, those dividends paid to the trustees from so much of its assets as were used in its business at the time it ceased operations, should, in the absence of a contrary intention expressed in the trust instrument, be held as principal of the trust fund. (*Lowry v. F. L. & T. Co.*, 172 N. Y. 142; *McLouth v. Hunt*, 154 N. Y. 179; *Matter of Kernochan*, 104 N. Y. 618; *Gibbons v. Mahon*, 136 U. S. 549; *Stewart v. Phelps*, 71 App. Div. 91; 173 N. Y. 621; *Matter of Rogers*, 22 App. Div. 428; 161 N. Y. 108; *Matter of James*, 146 N. Y. 78.)

CULLEN, Ch. J. The decree of the surrogate, from the affirmance of which by the Appellate Division this appeal is taken, judicially settles the accounts of the executors and trustees of the will of Julia A. Brooks. The controversy relates to the respective rights of life tenants and remaindermen in property, the subject of the trust under the said will. The testatrix created separate trusts for her five grandchildren, exactly alike in character. In each of these trusts she bequeathed to her executors 247 shares of Brooks Locomotive Works in trust, to receive the dividends, issues and profits thereof and apply the same to the use of the grandchild until

he became of the age of thirty years, at which time she gave the principal of the trust fund to said child absolutely. In case of the death of the grandchild without issue before arriving at the age of thirty years, then the fund was to go to the testatrix's surviving children and grandchildren. Though the probability is that the appellant Jesse Brooks Nichols will ultimately prove to be the remainderman in this fund, still, on account of the contingency that he may not survive until the age of thirty years, the questions involved must be determined on the ordinary principles which prevail between life tenants and remaindermen. The testatrix died November 30th, 1896. Even then the Brooks Locomotive Works was a very successful manufacturing corporation. From the time of the testatrix's death until June 20th, 1901, when the whole plant and properties were sold to the American Locomotive Company, its success was phenomenal. Owing to this fact and to the consolidation of the various interests and companies engaged in the manufacture of locomotives, the Brooks Company, on the sale of its plant and property, received a price several times its estimated value at the time of the decease of the testatrix. It is the distribution of this enhanced value between income and principal of the trust fund which has given rise to the principal questions involved in the present controversy. A majority of the court are of opinion (in which, personally, I do not share) that under the findings of the surrogate and the unanimous affirmance by the Appellate Division, the apportionment made by the surrogate of the funds and properties received by the executor on the dissolution of the Brooks Company cannot be disturbed. We all agree, however, that the principal amount in controversy, a very large sum, received for good will on the sale of the works, cannot be deemed income, but was properly awarded to principal of the trust as an appreciation in the value of the *corpus*. As this court has, within a few years, several times written at length on the general subject, we deem it unnecessary to do more than state our conclusion, and should affirm the decree below without opinion were it not that there is

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also presented by the appeal a question involving an amount small compared to the large fund which is the subject of these trusts, but which frequently arises in the administration of estates.

The trustees have invested large portions of the fund, which came into their hands on the dissolution of the Brooks Company, in bonds purchased at a premium. The appellant Tyler contended before the surrogate that from the interest collected on those bonds there should be deducted, as it was collected, a sum sufficient to make good at the maturity of the bonds the amount paid as a premium. The surrogate overruled this claim and awarded the whole amount of the interest coupons to the life tenant as income. This disposition was erroneous and is in conflict with the recent decision of this court in *New York Life Ins. & Trust Co. v. Baker* (165 N. Y. 484). It was there held that where trust funds are invested by the trustee in bonds having a term of years to run and purchased at a premium, such a proportionate deduction should be made from the nominal interest as will, at the maturity of the bonds, make good the premium paid, and thus preserve the principal of the fund intact. It is true that in that case the late chief judge of this court said that the language of the will and the surrounding circumstances might indicate a different intention on the part of the founder of the trusts, in which case the testator's intent would control. Such was the case in *Matter of Hoyt* (160 N. Y. 607), where a testator left as a trust fund for his daughter and only child a comparatively small share of a vast fortune and directed the income to be applied to her use "in the most bounteous and liberal manner." It was held by a divided court that the life tenant should not be charged with any part of the premium paid for the security in which the trust fund was invested. In the earlier case of *McLouth v. Hunt* (154 N. Y. 179) it was held that the life tenant should not be charged with premium on bonds received in kind from the estate of the testator. But as to investments made by the trustees it was

said: "There were \$5,000 of the United States bonds purchased by the trustees after the erection of the trusts at the same premium. There may be reasons for charging the life tenants with the premium on these bonds that do not apply to the others. But that item is so insignificant that it does not play any part in the controversy. All questions as to the premiums on these bonds were virtually waived on the argument." While we admit, in accordance with the decision in *Matter of Hoyt*, that the terms of the will may be such as to take a case without the general rule that the principal of the fund must be preserved intact, we think that to justify such an exception to the rule the intent should be expressed in the very clearest manner. If we are to lay down the doctrine that the question is to be determined on the peculiar facts and language of each particular case, no trustee will know how to safely act, and a question constantly arising in the administration of estates will be involved in great confusion and be the cause of great litigation, the latter often at an expense to the estate greater than the sum involved. Such a result would prove very unfortunate.

The justification for the rule is very apparent. The income on a bond having a term of years to run and purchased at a premium is not the sum paid annually on its interest coupons. The interest on a \$1,000 ten-year five per cent bond, bought at 120%, is not fifty dollars, but a part thereof only, and the remainder is a return of the principal. All large investors in bonds, such as banks, trust companies and insurance companies, purchase bonds on the basis of the interest the bonds actually return, not the amount they nominally return. Nor is the premium paid on the bond an outlay for the security of the principal. All government bonds have the same security, the faith of the government; yet they vary in price, a variation caused by the difference in the rate of interest and the time they have to run. It is urged that there is often a speculative change in the market value of a bond, and a bond may be worth more at the termination of the trust than at the time of its purchase. This has no bearing on the

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case. The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But apart from any speculative change in the market value, there is from lapse of time an inherent and intrinsic change in the value of the security itself as it approaches maturity. It is this, and this only, with which the life tenant is to be charged. We, therefore, adhere to the rule declared in the *Baker* case, that in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run, while if the bonds are received from the estate of the testator, then the rule in the *McLouth* case prevails, and the whole interest should be treated as income. These rules may not work perfect justice in all cases, and we fully appreciate that there may be inconsistencies between them, but it is far better that they should be uniformly adhered to, even at the expense of a particular case, than that the administration of estates should be subjected to constant litigation and disputes. It is also to be said that unless the rule in the *Baker* case is to be observed, the relative rights of life tenant and remainderman would largely depend on the favor or caprice of the trustee who might either buy a bond bearing a high rate of interest at a great premium and impair the principal, or buy a bond bearing a lower rate of interest substantially at par, and preserve the principal intact.

The order of the Appellate Division and the decree of the surrogate of Chautauqua county should be modified in accordance with this opinion, and for that purpose the proceedings remitted to the surrogate to state the account, with costs to both parties payable out of the estate.

EDWARD T. BARTLETT, J. (dissenting). I am unable to agree with the conclusion reached by the chief judge that where investments are made by the trustee the principal must be maintained intact from loss occasioned by payment of premium on securities having only a definite term to run. Nor

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can I agree that the laying down of such a hard and fast rule is supported by *New York Life Ins. & Trust Co. v. Baker* (165 N. Y. 484), and is not in conflict with *McLouth v. Hunt* (154 N. Y. 179) and *Matter of Hoyt* (160 N. Y. 607). It is true that in the *McLouth* case the greater portion of the securities held by the trustees in trust were purchased by the testator in his lifetime. In the *Hoyt* case the trustees were authorized to set apart in the trust fund any of the securities held by the testator, but decided not to do so, and invested \$1,250,000 of the trust in government four per cent bonds and railroad bonds at a high premium. The result was that this premium reached twenty-nine per cent for the government bonds and thirty-three and one-half per cent for some of the railroad bonds, so that nearly \$245,000 was absorbed by the premium. If a hard and fast rule is to be laid down for the government of trustees, there is, in my opinion, no well-grounded distinction between securities passing into the trust from the general estate of a testator and those purchased by trustees in the exercise of their power under the will.

In the *McLouth Case* (*supra*) two questions were presented: (1) As between life tenant and remainderman, who should bear the loss by the wearing away of premiums; (2) whether a stock dividend was income or capital. The latter question is not involved in this discussion. It was amid great conflict of authority in England and this country that the *McLouth* case was carefully considered and decided by a unanimous court. Judge O'BRIEN, writing for the court, said (p. 189): "Notwithstanding the conflict of authority to which I have just referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement, and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition and all the surrounding facts and circumstances of the case." This rule was strictly applied in the *Hoyt Case* (*supra*) and

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the *Baker Case* (*supra*). In the *McLouth* case it was held, after examining the will and surrounding circumstances, that a testatrix, in creating a trust, of which her grandchildren were, in effect, made life tenants up to a specified age and then remaindermen, directed that while life tenants they should receive the "full income," it was her intention that they should receive the entire annual interest of the bonds without diminution by the reservation of a portion thereof to meet any depreciation in the market value of the bonds through their approaching maturity, that is, that the premium should not be charged to the life tenant and that this intention of the testatrix was controlling.

In the *Hoyt* case a different situation was presented. The testator, Jesse Hoyt, a well-known millionaire of his day, died leaving about \$8,000,000, the entire amount of which he bequeathed to his brothers and their children. The opinion states (p. 613): "For some reason not disclosed by this record, but which we must assume was sufficient, the testator made a very peculiar will so far as his only child and daughter was concerned. By the fourth clause thereof he directed that the sum of \$1,250,000 should be appropriated from his estate and held in trust for the use and benefit of his daughter during her life. The trustees were directed to collect and receive the interest, dividends and income therefrom and from each and every part thereof, and to apply to her use, for and during her natural life, in the most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires." This case was decided not only by considering the language employed by the creation of the trust, but the surrounding circumstances and the relations of the parties to each other, which were peculiar and most persuasive in leading the court to the conclusion that the testator, who left no part of his millions absolutely to his only child and daughter, intended that the trust provision entitled her to the entire income thereof, and the loss by the wearing away of premiums might well be borne by the remaining millions in the estate which passed to

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collaterals. In other words, this case was decided by the application of the broad and reasonable rule laid down in the *McLouth* case, already quoted.

The case of *New York Life Ins. & Trust Co. v. Baker* (*supra*) was no departure from the position assumed by this court in the two cases discussed, but followed the rule there established. PARKER, Ch. J., in the opinion of the court, cites both the *McLouth* and *Hoyt* cases, and states in full the rule laid down in the former case. The learned judge then says: "In the surrounding facts and circumstances in this case we find nothing that leads us to the conclusion that the testator intended any different treatment of the trust than that which the language of the clause creating it plainly indicates, viz., that the capital of the trust should be kept intact, and to that end an adequate proportion of the annual income should be set apart to make good the amount paid in premiums in order to secure a proper investment."

The case at bar is voluminous and some of its most important questions have already been determined by the vote of this court, with which I agree. We have surviving this single question, whether the life tenant or remainderman in the trusts before us should bear the loss occasioned by the wearing away of premiums. In my opinion the provisions creating the trusts and the facts bearing upon this question lead inevitably to the conclusion that it was the intention of the testatrix that the life tenant should receive the full income of the trust fund. We have here five separate trusts in favor of as many grandchildren of the testatrix. The language of the trusts is identical, save as to name of beneficiary, and provides as follows: "I give and bequeath to my executors hereinafter named two hundred and forty-seven (247) shares of the capital stock of the Brooks Locomotive Works aforesaid, to have and to hold the same in trust nevertheless, to collect and receive the dividends, issues and profits thereof, and to apply the same to the use of my grandson, Jesse Brooks Nichols, in semi-annual payments or as often as the same shall be declared paid or realized, until my said grandson shall

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arrive at the age of thirty years." It is then provided that on the happening of said event the shares of stock, with any accumulations or earnings thereon, shall be transferred to the beneficiary. It is also provided that in case the grandson dies before attaining the age of thirty years the stock, etc., shall pass to his issue, and failing in that, to the surviving children and grandchildren of the testatrix, share and share alike.

Reference need be made to only a few of the many facts involved in this voluminous record in order to make clear the intention of the testatrix. In the year 1869 Horatio G. Brooks, the husband of the testatrix, organized the company known as the Brooks Locomotive Works, the plant being located at Dunkirk, Chautauqua county. From that time until his death in 1887 Brooks was the president of the company and its dominating spirit. The capital stock was \$250,000, divided into 2,500 shares of the par value of \$100 each, and it so remained during the entire existence of the company. The business of the company was the manufacture of railroad locomotives. The corporation passed through various vicissitudes and at times prior to 1886 was barely kept going, the greatest depression occurring in the year 1873; succeeding the panic of that year the business increased and the company became solvent and prosperous before Mr. Brooks' death.

Julia A. Brooks, the testatrix, died November 5th, 1896, owning 1,700 of the 2,500 shares of the capital stock of the company. From 1887 to 1896 the business was exceedingly prosperous. In 1896 there began a new era in locomotive building and the business of the company was very greatly increased. Mrs. Brooks by her last will and testament created the five separate trusts in favor of her grandchildren, to which reference has already been made. The principal of each of these trusts consisted of 247 shares of the company, aggregating for the five trusts 1,235 shares. From the death of the testatrix in 1896 to the sale of the company outright of its business and property to the American Locomotive Company on June 20th, 1901, there was an enormous increase of business and profits,

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the aggregate dividends during that period amounting to 305 per cent on the capital stock. The net amount of the purchase price, after deducting from the gross sum of \$6,626,837.00 certain items, the nature of which is not material at this time, amounted to \$4,198,437.00, representing principal. The 1,235 shares, constituting the five trust estates, received of this net amount as increase of capital \$2,083,907.88. After the sale there was paid to the stockholders, including the trustees under the will, as accumulated surplus earnings, the sum of \$900,000 with the assent of all parties. This payment is expressly found by the surrogate and as a fact stands unanimously affirmed by the Appellate Division.

It thus appears that at the time of testatrix's death in 1896 this era of great prosperity had already dawned and the capital stock was then appraised at the sum of \$450 per share, its par value being \$100. The testatrix in "Article Thirteenth" of her will expressed the wish that the investment in each of the trusts should be maintained in the stock of the Brooks Locomotive Works, adding that if there was in the future any change of condition surrounding the business which in the judgment of a majority of her trustees required a sale of the stock for the preservation of the principal, it might be made. The testatrix had seen this stock largely increase in value when she created the five independent trusts. It is fair to assume that she was so impressed with the business future of the Brooks Locomotive Works as to direct her trustees to hold this stock unless satisfied to do so would place the principal in jeopardy. She was convinced that at the termination of the trust each beneficiary would receive not only the stock, but in all human probability a vast increase in excess of its par value.

One other fact should be alluded to in this connection as presumably exerting great influence on the mind of the testatrix. In all of these trusts the so-called life tenant and remainderman is one and the same person, subject to death under thirty years of age of the former, these terms being used as convenient forms of identification. Added to these

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existing facts was the testamentary scheme that the life tenant could not finally receive the principal of the trust until attaining the age of thirty years. It was in this situation that the testatrix directed her trustees "to collect and receive the dividends, issues and profits thereof, and to apply the same to the use of," etc. (naming the beneficiary). The testatrix having deemed it prudent to postpone for a very considerable time the payment over of principal, and in view of the surrounding circumstances, it is quite reasonable that she should have ordered the payment over of dividends, issues and profits without directing the deduction therefrom of sums sufficient to meet the wearing away of premiums if the trustees should in the future see fit to invest this large increase of capital in securities at prices above par. It is fair to suppose that testatrix argued with herself that in all human probability the grandchild receiving the dividends, issues and profits from time to time would, on attaining the age of thirty years, receive the stock with enormous accretions, and that there was no reason why he should not receive the full income of the trust estate until that distant day should arrive.

I am of opinion that to establish a hard and fast rule, as suggested in the opinion under consideration, would not only work great hardship in many cases, but is an overruling of the decisions of this court already discussed and ignoring the principle of *stare decisis*. It is doubtless true that a testator ought to provide in his will as to where the loss in the wearing away of premiums should fall. It is, however, unfortunately the fact that wills in this respect and many others are left to construction after considering the language of the will, the condition of the parties and all the surrounding circumstances in accordance with the rule established by this court.

The order of the Appellate Division and the decree of the surrogate should be affirmed, with costs.

HIGHT, WILLARD BARTLETT and HISCOCK, JJ., concur with CULLEN, Ch. J.; VANN and WERNER, JJ., concur with EDWARD T. BARTLETT, J.

Ordered accordingly. 2

ANTHONY SPENCER, Respondent, v. THE STATE OF NEW YORK,
Appellant.

COURT OF CLAIMS — PRACTICE — NEGLIGENCE — FAILURE TO MOVE FOR NON SUIT AT CLOSE OF EVIDENCE PRECLUDES REVIEW OF QUESTIONS OF LAW. Under the provisions of the Code of Civil Procedure relating to the Court of Claims (§ 263 *et seq.*) there is no reason why the practice therein ordinarily should not be measured or judged by the same rules as prevail in the Supreme Court. Where, therefore, upon the trial, in the Court of Claims, of a claim against the state for injuries alleged to have been sustained by an employee thereof by reason of the negligence of a canal bridgetender, the counsel for the state failed to renew, at the close of all the evidence, a motion for a nonsuit, which was made and denied at the end of the evidence for the claimant, such failure will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the claim and case dismissed as a matter of law; and a contention that the bridgetender, at the time he injured the claimant, was not acting within the scope of his employment so as to render the state liable for his misconduct and that, therefore, the claimant should have been nonsuited upon the trial, cannot be considered upon an appeal from a judgment of the Appellate Division affirming a judgment, granted by the Court of Claims, against the state and in favor of the claimant.

Spencer v. State of New York, 110 App. Div. 585, affirmed.

(Argued January 24, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 16, 1906, affirming a judgment in favor of plaintiff entered upon an award of the Court of Claims.

The nature of the action and the facts, so far as material, are stated in the opinion.

Julius M. Mayer, Attorney-General (*George P. Decker* and *Willis H. Tennant* of counsel), for appellant. The injury and damage which the claimant sustained was not caused by the use or management of the canals or other things connected with the canals, and hence the Court of Claims has no jurisdiction of the subject-matter of the claim,

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nor is the state liable to claimant therefor, it never having consented to be held liable therefor. (*Locke v. State*, 140 N. Y. 480.)

Horace G. Pierce for respondent. The exception to the refusal to dismiss the case was properly denied for the reason that at that stage of the trial it was necessary for the state to introduce evidence to overcome or explain the presumption of negligence. This exception is not available and there was no other exception taken in the case. (*Sharp v. E. R. R. Co.*, 184 N. Y. 100; *Becker v. Koch*, 104 N. Y. 304; *M. Co. v. Phillips*, 109 N. Y. 303; *Cross v. Cross*, 108 N. Y. 628; *Magar v. Hammond*, 183 N. Y. 387; *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Lynch v. M. E. R. R. Co.*, 90 N. Y. 77; *Cohen v. D. D., etc., R. R. Co.*, 69 N. Y. 170.)

HISCOCK, J. While plaintiff was at work for defendant around one of its canal bridges, in the city of Rochester, he was struck and injured by a plank which was thrown down upon him from the elevated bridge by one Patterson, who was a bridgetender, and for the damages resulting from such injuries he has recovered judgment.

It is urged in behalf of the appellant that at the time Patterson injured the respondent, he was engaged in an enterprise of his own and was not in any degree whatever acting within the scope of his employment so as to render the state liable for his misconduct, and that, therefore, the plaintiff should have been nonsuited upon the trial. We think that there would be great force in this contention if the appellant were in position to make it, but as the case is presented upon appeal this question is not available.

If the appellant's contention is correct, then there was no evidence upon which the Court of Claims could render judgment in favor of the plaintiff, and his complaint should have been dismissed as a matter of law upon a motion for a nonsuit. Such motion was duly made at the close of the plaintiff's case and denied. Defendant then proceeded to offer evi-

dence upon its behalf and at the close of all of the evidence the motion for a nonsuit was not renewed, but the case was submitted to the court for consideration, and thereafter what amount to findings of fact were made and judgment rendered. In fact, the request made at the close of all the evidence by the deputy attorney-general that the court should "Find that it was no part of Mr. Patterson's duty to be on this bridge and he was not in any sense acting as the officer, agent or servant of the State in doing what he did do that caused the injury," seems almost to imply the idea of a question of fact to be passed upon. Certainly it was not fairly a motion for a nonsuit, and no ruling was made and consequently no exception taken which would enable this court to pass upon the rights of the defendant as they then stood.

It is well settled that upon a trial the defendant may supply deficiencies in plaintiff's proof, and that in courts of record at least, the failure to renew or make a motion for a nonsuit at the close of all of the evidence will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the complaint and case dismissed as a matter of law. (*Jones v. Union Ry. Co.*, 18 App. Div. 267; *Griffith v. Staten Island R. T. R. R. Co.*, 89 Hun, 141; *Hobson v. N. Y. Condensed Milk Co.*, 25 App. Div. 111; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628.)

The learned attorney-general upon this appeal does not dispute this proposition but he seeks to avoid its application to this case by an argument in substance that the Court of Claims is a less formal tribunal than the Supreme Court and that the practice therein should not be measured or judged by the same rules as prevail in the latter court. We are unable to adopt this argument either as a matter of statutory construction or of general policy.

The provisions of the Code upon that subject (Secs. 263 *et seq*) reorganized the former Board of Claims into the Court of Claims, and made the latter one of the regular and important judicial tribunals of the state. It is made a court of

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record and these provisions invested it with a wide jurisdiction and amongst other things provided for regular sessions, for formal judgments and for appeals therefrom analogous in many substantial provisions at least to appeals from the Supreme Court. Section 265 expressly provides that "The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court." We know of no rule, provision or practice which inclines us to hold that upon the trial of a claim counsel should not be held in respect to the point now involved to the rule long established and well understood in the Supreme Court and other courts of record and be required to make his views apparent by proper motion, if he thinks at the close of all of the evidence that there is no question of fact to be passed upon. We feel quite clear that it is wiser to make this rule of practice applicable to so important a tribunal as the Court of Claims and thereby increase the formality and regularity of its proceedings rather than to hold otherwise and permit counsel after maintaining an uncertain position upon the trial to raise questions in the Appellate Court which were not fairly and distinctly presented below.

These views lead to the conclusion that without consideration of its merits the judgment appealed from must be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT and HAIGHT, JJ., concur; WILLARD BARTLETT, J., concurs in result; CHASE, J., not sitting.

Judgment affirmed.

NORMAN COLE, as Executor of ELIZABETH THOMAS, Deceased,
Appellant, v. MARY SWEET, Respondent.

1. EVIDENCE — PERSONAL TRANSACTIONS WITH DECEDENT — CODE CIV. PRO. § 829. The object of the enactment of the limitation of section 829 of the Code of Civil Procedure, relating to the examination of a party, etc., was to so carefully balance rights that the survivor should not take advantage of a deceased person, and the personal representatives should not take advantage of a survivor. The party for whose protection the limitation was made may keep the door closed if he chooses, but if he opens it at all, he opens it wide as to any transaction concerning which he examines the survivors.

2. ACTION TO RECOVER MONEYS ALLEGED TO HAVE BEEN OBTAINED FROM DECEDENT BY FRAUD — WHEN DEFENDANT MAY TESTIFY AS TO PERSONAL TRANSACTIONS. Where, in proceedings to settle executor's accounts, a residuary legatee claiming that the executor had failed to recover moneys obtained by a party from the testatrix by undue influence and fraud, partially examines such party as to personal transactions with the deceased, and it being concluded that the surrogate had no jurisdiction, the proceedings are suspended and such legatee induces the executor as nominal plaintiff to bring an action to recover the amount, and in such action he introduces in evidence the statements of defendant made in the proceeding before the surrogate, he thereby waives his privilege under section 829 of the Code of Civil Procedure, and the defendant is entitled to testify as to the whole of any transactions about which she was examined in the proceeding; since if the representative of decedent speaks himself or compels the survivor to tell a part, he waives the right to object to his telling the rest.

Cole v. Sweet, 112 App. Div. 777, affirmed.

(Argued January 80, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 21, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was brought by the executor of Elizabeth Thomas, deceased, to compel the defendant to account for certain moneys and property alleged to have been obtained by her from the testatrix by undue influence and fraud. The answer was in substance a general denial.

Before this action was commenced the plaintiff, as executor, attempted to account before the surrogate, but the residuary legatee filed objections and sought to surcharge his account with the amount of the claim for which the present action was subsequently brought. The issue thus joined in that proceeding was tried before the surrogate, and Mary Sweet, the defendant herein, was called and sworn as a witness for the residuary legatee. After she had been examined at some length in his behalf as to various personal transactions she had had with the testatrix, "it was concluded that the surrogate had no jurisdiction to determine the question and the following stipulation was entered into between Mr. Stephen Thomas, the residuary legatee, and Norman Cole, the executor of the last will and testament of Elizabeth Thomas, deceased," to wit: "The parties agree in open court that an action shall be brought in the name of the executor against Mary Sweet to recover such sums of money and for such cause or causes of action as the residuary legatee may deem proper. The residuary legatee to designate attorneys and counsel in such action, who shall have full charge of the prosecution thereof, and the residuary legatee shall save harmless the said executor from any claim which may arise against him on account of the institution of such action or on account of the defense to any action which may be brought by Mary Sweet."

Nothing further was done before the surrogate, and the accounting seems to have been suspended to await the determination of an action to be brought pursuant to said stipulation. The present action was brought accordingly, and upon the trial thereof the first witness called by the plaintiff was the official stenographer who took the testimony of Mary Sweet in said proceeding before the surrogate. After the typewritten copy embracing all her testimony had been identified and sworn to as correct it was offered in evidence by the plaintiff. The defendant objected on the ground that it was incompetent, and that "the witness is here in court and should be examined in the regular way." The objection was overruled, and the transcript, which covers twenty-six pages

of the appeal book, much of it quite material to the issue, was read in evidence. When the plaintiff rested, the defendant, having been sworn in her own behalf, sought to give the rest of such personal transactions with the decedent as she had been asked about and partially examined upon before the surrogate, but an objection was interposed under section 829 of the Code of Civil Procedure. An exception to the ruling which admitted the evidence raises the question discussed in the opinion. Upon the submission of the action the trial court found that the defendant had not been guilty of fraud or undue influence and dismissed the complaint, with costs. The Appellate Division affirmed and the plaintiff appealed to this court.

James A. Kellogg and *Erskine C. Rogers* for appellant. Defendant's testimony upon the trial was incompetent under section 829 of the Code of Civil Procedure, and the objections thereto should have been sustained. (*Whiton v. Snyder*, 88 N. Y. 299; *M. S. D. Co. v. Dimon*, 55 App. Div. 538.)

A. Armstrong and *L. Armstrong* for respondent. Plaintiff, by introducing a transcript of the evidence received in the Surrogate's Court and making it substantive proof, opened the door for a full explanation by defendant of all her money transactions with decedent, and her testimony on the trial was properly admitted. (*Whiton v. Snyder*, 88 N. Y. 299; *M. S. D. Co. v. Dimon*, 55 App. Div. 538; *Nay v. Curley*, 113 N. Y. 578; *Merritt v. Campbell*, 79 N. Y. 625.)

VANN, J. When the legislature decided to change the common-law rule of evidence which prohibited parties from testifying upon the trial of an action, it was deemed necessary to surround the change with certain limitations in order to protect the estates of deceased persons and those claiming under them. Accordingly, after providing that parties and persons interested in the event of an action should be competent witnesses, it was further provided that they should not be examined in their own behalf as against the personal

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representative of a deceased person concerning a personal transaction or communication between the witness and the decedent. This limitation was made on the theory that the voice of the survivor should not be heard when that of the other party is silent in death. When, however, the personal representative gives evidence in his own behalf or the testimony of the decedent is given in evidence concerning such a transaction, the door is open to the survivor to testify fully in his own behalf in regard to that transaction. (Code of Pro. § 399; Code Civ. Pro. § 829; *Potts v. Mayer*, 86 N. Y. 302.)

The limitations of the statute may be waived by the personal representative, not only by the failure to object on the proper ground, but also by calling the survivor as a witness and going into a transaction had by him with the decedent in person. The statute does not make the survivor incompetent generally, even as a witness in his own behalf, but only as against the personal representative and concerning a personal transaction with the decedent. The personal representative, therefore, may call his adversary and examine him at will as to any transaction with the decedent, but in so doing he waives the benefit of the statute and opens the lips of the witness so that he can testify in his own behalf fully and at large as to the transaction thus gone into. (*Nay v. Curley*, 113 N. Y. 575; *Merritt v. Campbell*, 79 N. Y. 625.)

The statute has been many times amended, but in all the changes the uniform effort of the legislature has been to so carefully balance rights that the survivor should not take advantage of a deceased person and the personal representative should not take advantage of a survivor. The party for whose protection the limitation was made may keep the door closed if he chooses, but if he opens it at all, he opens it wide as to any transaction concerning which he examines the survivor.

When these principles are applied to the case before us the answer to the question so ably discussed by counsel is not difficult. The defendant made no voluntary statement in Surrogate's Court which could be proved by the personal repre-

sentative with the effect only of an ordinary admission. If the survivor says something on the street or volunteers information as to a transaction he had with a decedent, his statement may be proved against him as an admission without waiving any right under the statute. Acting under no compulsion exercised by those interested in the estate of the decedent, he runs the risk of having his admission proved, with no right to go into the transaction generally, or to go beyond proof of all that he said when the admission was made. This was not the situation of the defendant when she was called as a witness in Surrogate's Court. She was not sworn in her own behalf, but in behalf of the residuary legatee, who stands before us as virtually the plaintiff in this action. When he asked her to take the stand, the law commanded her to be sworn and to answer all questions put to her under the direction of the court. Acting under the highest compulsion, rightfully exercised by the residuary legatee, she obeyed the command of the law and answered his questions as to various transactions she had had with the testatrix during a long series of years. When the residuary legatee had thus partially examined her as to those transactions he abandoned the proceeding then in court and through the personal representative commenced this action. The gain or loss from the result is his and in a broad sense he is the party in interest though not the actual party on the record. He is represented by the same counsel as before and controls the action the same as he did the special proceeding. When this action came to be tried he read the testimony thus taken in Surrogate's Court at his instance as the main part of the evidence on which he sought a heavy recovery from the defendant. He offered it to prove his case without calling the defendant as a witness. He had a right to do this and no complaint is made because he did it, but when the defendant tried to give the entire transaction concerning which she had partially testified in his behalf, he invoked the statute to prevent it. After compelling her to state a part of what was said and done by herself and the decedent, he insisted that she could not

explain the transaction or state all that was said and done. He could not thus turn a shield into a sword. The careful balance of rights made by the legislature to protect both parties and injure neither, would be disturbed if he could thus take advantage of the defendant. It would promote fraud instead of preventing it, which is the aim of the statute. Having forced her to tell a part of her story before the surrogate he could not read it as evidence in this action and then prevent her from telling the whole, because the spirit of the statute, as interpreted by the decisions of the courts, is against it. The spirit of the statute is that the survivor shall not speak when the decedent cannot, unless the representative of the decedent speaks himself, or compels the survivor to tell a part when he waives the right to object to his telling the rest. Thus in *Nay v. Curley* (*supra*) the court, after referring to section 829, said: "But that section was not intended to abrogate the principle in the law of evidence, that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. This rule does not need the sanction of authority. It is founded upon obvious equity and justice. A part of the truth often implies a falsehood, and in the search for truth through the examination of witnesses, courts do not countenance partial statements of facts by witnesses. The principle adverted to is just as applicable in reason to a case where a party calls an adverse party and examines him as to one fact or phase of a transaction in his favor, and then discontinues the inquiry, as in any other. The party examined by the other may, at his own instance, complete the narration for the purpose of explaining, modifying or putting in a different light the particular part to which the examination by the adverse party was restricted. Section 829 in no manner affects the application of the rule."

The point would not be open to discussion if the defendant

had been sworn in this action in behalf of the plaintiff, but there is no substantial difference between such a situation and the one before us, where the testimony of the defendant taken in another proceeding at the instance of the real plaintiff herein was read in evidence *in extenso*. Equality cannot be preserved, nor unfair advantage prevented if a party is allowed to do indirectly, that which he could not do directly.

We think, as was said by the learned Appellate Division, "that the plaintiff, under the circumstances presented here, by reading the defendant's testimony given in the Surrogate's Court in evidence as a part of his case on this trial, is in no different position than if he had called the defendant to the stand as his witness and elicited from her the same testimony which she had given in the Surrogate's Court. The evident purpose in not calling her was to prevent her from giving on cross-examination the testimony now objected to by the plaintiff. * * * The plaintiff, by the course adopted in getting her testimony, has, * * * clearly opened the door to the defendant to tell the whole of any transaction about which she had been partially examined and should be held to have waived the right to invoke the aid of section 829 to prevent her from so doing." This is the rule in every state where the question has been considered, so far as we are able to discover. (*Lilley v. Mutual Benefit Life Ins. Co.*, 92 Mich. 153, 159; *Matter of Smith*, 52 Mich. 415; *Martien v. Barr*, 5 Mo. 102.)

We think the evidence objected to was properly received and, after examining the other questions discussed by counsel, we are of the opinion that the judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, WEENER, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
EDWARD SEXTON, Appellant.

1. MURDER — CIRCUMSTANTIAL EVIDENCE. A defendant indicted for a homicide may be found guilty upon evidence which is wholly circumstantial, and where it appears, upon a review of such evidence, that the uncontradicted and unexplained facts and circumstances, proved upon the trial, not only establish the existence of a powerful motive for the commission of the crime by the defendant, but form so complete and strong a chain of evidence as to exclude, beyond a reasonable doubt, every hypothesis save that of defendant's guilt, a verdict convicting him of murder in the first degree will be sustained.

2. TRIAL — CROSS EXAMINATION BY PROSECUTION OF ITS OWN WITNESS. While it is the general rule that a party may not impeach his own witnesses, it is not erroneous for the trial court, in the exercise of its judicial discretion, to permit the district attorney, in examining hostile and unwilling witnesses for the prosecution — the wife and daughter of a defendant indicted for a homicide — to ply them with leading questions and even cross-examine them, in order that the whole of the truth may be elicited, especially where such witnesses contradicted none of their earlier statements tending to favor the defendant, but simply reiterated them.

3. INDICTMENT — WHEN DENIAL OF MOTION TO DISMISS NOT ERRONEOUS — LEGALITY AND SUFFICIENCY OF EVIDENCE UPON WHICH INDICTMENT IS FOUND — CODE CRIM. PRO. § 318. A motion to dismiss an indictment may be made in any case where it is claimed that the legal evidence received by a grand jury is insufficient to support an indictment, or that illegal evidence is the sole basis therefor, for this is a constitutional right notwithstanding the provisions of section 318 of the Code of Criminal Procedure to the contrary; and the right to make such a motion implies the right to have an adverse decision reviewed by the Court of Appeals upon an appeal from a judgment of conviction in a capital case; but where the moving affidavits are vague and unsatisfactory and the court's attention is directed to no illegal evidence that was presented to the grand jury, and the general charge that the evidence was insufficient is supported by no direct or definite statements, a denial of the motion upon the grounds that the evidence was sufficient to sustain the indictment, and that none of the evidence was illegal, will be sustained.

4. RECEPTION, BY GRAND JURY, OF THE UNSWORN TESTIMONY OF INFANTS UNDER TWELVE YEARS OF AGE — WHEN EXAMINATION AS TO INTELLIGENCE OF SUCH WITNESSES BY GRAND JURY IS SUFFICIENT COMPLIANCE WITH LAW — CODE CRIM. PRO. § 392. The fact that two of the witnesses, who were examined before the grand jury, were children under the age of twelve years, although they were neither sworn nor

examined as to their intelligence, pursuant to the statute (Code Crim. Pro. § 892), by the justice who presided at the term during which the defendant was indicted, does not affect the validity of the indictment, where the justice, before whom a motion to dismiss was made, and who examined the minutes of the grand jury decided that there was sufficient other evidence to sustain the indictment; but where it appears from the affidavit of the district attorney, upon the motion to dismiss the indictment, that the statute was literally complied with in the examination of the children before and by the grand jury, such examination is a sufficient compliance with the statute, since a grand jury, although a part of the court with which it is convened, is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules; and, as the statute (Code Crim. Pro. § 892) authorizing the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen, the grand jury has the power to determine for itself the qualifications of such witnesses so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances.

(Argued January 29, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Supreme Court, rendered April 29, 1904, at a Trial Term for the county of Ontario, upon a verdict convicting the defendant of the crime of murder in the first degree.

Royal R. Scott for appellant. It was improper and illegal to permit the district attorney to cross-examine and impeach his own witnesses. (*Sanchez v. People*, 22 N. Y. 148; *Town of Ontario v. Union Bank*, 21 Misc. Rep. 770; *Hankinson v. Van Tine*, 152 N. Y. 20; *Morris v. Wells*, 26 N. Y. S. R. 9.) The map was improperly admitted in evidence, and its admission over defendant's objection was clearly prejudicial to defendant. (3 Rice on Ev. 154; *People v. Buddensieck*, 103 N. Y. 490; *People v. Fish*, 125 N. Y. 147; *Cowley v. People*, 83 N. Y. 466; *Marble v. McMinn*, 57 Barb. 610; *Curtis v. Ayrault*, 3 Hun, 487; *Dederich v. S. L. C. R. R. Co.*, 35 L. R. A. 802; *Rodriguez v. State*, 32 Tex. Cr. 259; *Johnston v. Jones*, 66 U. S. 209; *Dunn v. Hayes*, 21 Me. 276.) The order denying defendant's motion to dismiss the indictment was erroneous and said motion should have been granted. (*People v. Price*, 6 N. Y. Cr. Rep. 141; *People*

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v. *Clements*, 5 N. Y. Cr. Rep. 288; *People v. Briggs*, 60 How. Pr. 17; *People v. Glen*, 173 N. Y. 395; *People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Hyler*, 2 Park. Cr. Rep. 570; *People v. Petrea*, 1 N. Y. Cr. Rep. 198; *People v. Sellick*, 4 N. Y. Cr. Rep. 329; *People v. Haines*, 6 N. Y. Cr. Rep. 100; *People v. Brickner*, 8 N. Y. Cr. Rep. 217.)

Robert F. Thompson for respondent. A witness unexpectedly hostile may be contradicted and impeached. (Underhill on Crim. Ev. 262; *People v. Kelly*, 113 N. Y. 647; *Vollkommer v. Cody*, 177 N. Y. 129; *Maloney v. Martin*, 81 App. Div. 432.) The map was properly admitted in evidence. (*People v. Rimieri*, 180 N. Y. 163.) The order denying defendant's motion to dismiss the indictment was not erroneous and Justice DAVY's decision was right. (*People v. Diamond*, 72 App. Div. 281; *People v. Johnson*, 185 N. Y. 219.) The grand jury has the power, by virtue of section 392 of the Criminal Code, to decide whether a child is of sufficient understanding to comprehend the nature of an oath. (*People v. Willis*, 23 Misc. Rep. 573; *People v. Farrell*, 20 Misc. Rep. 219; *People v. Winant*, 24 Misc. Rep. 361; *People v. Dorthy*, 50 App. Div. 50; *People v. Naughton*, 7 Abb. [N. S.] 421; *Hackley Case*, 21 How. Pr. 53; *Matter of Choate*, 8 N. Y. Cr. Rep. 7; *People v. Molineux*, 27 Misc. Rep. 79; *Eighmy v. People*, 79 N. Y. 546; *People v. Proskely*, 37 Misc. Rep. 367; *People v. Steinhardt*, 47 Misc. Rep. 252.) The district attorney did not make improper statements to the prejudice of defendant during the trial nor in his summing up. (*People v. Doody*, 172 N. Y. 166; *People v. Flanagan*, 158 N. Y. 722.)

WERNER, J. On the 23d day of June, 1903, the dead body of Thomas Mahaney, Jr., was found in a field which was part of a small farm occupied by him, his wife and their children, in the town of Farmington, in the county of Ontario. The deceased had plainly been killed by some person armed with a shotgun loaded with No. 6 shot, for in his left temple there

was a large wound filled with shot of that size, surrounded over a circumference of about two and one-half inches with somewhat scattered perforations caused by the same kind of missiles, many of which had passed through the temporal bone and penetrated the brain. Suspicion pointed to the defendant as the perpetrator of the foul deed. He was arrested and indicted upon the charge of murder in the first degree. His trial and conviction followed and he has now appealed to this court. The case of the prosecution rests wholly upon circumstantial evidence, in which the element of motive is an important factor. The principal question we have to consider is whether the circumstances arrayed against the defendant form so complete and strong a chain of evidence as to exclude beyond a reasonable doubt every hypothesis save that of his guilt. As that necessitates a recital of the essential features of the evidence submitted to the jury, it may conduce to clearness and brevity of statement if we begin the narrative with the earliest mention of the relations of the decedent and the defendant toward each other, and then continue it chronologically down to its tragic ending.

The story begins at a period preceding the year 1895 when the decedent, then a youth of eighteen, resided with his parents on a small place near the scene of the homicide, and the defendant and his wife and children lived on the premises which they occupied at the time when the defendant was charged with the commission of this crime. We are not informed as to the character or extent of the relations between these two men at that early period, beyond what may be inferred from their proximity of residence in a rural community. In 1894 the defendant had been convicted of some criminal offense for which he had been sentenced to serve a term of one year in the penitentiary. Upon his release from incarceration at some time in 1895 he returned to his home, and soon thereafter was again arrested at the instance of his wife upon the charge of assault. At the trial upon that charge, which took place before a justice of the peace and a jury, the defendant conducted his own defense and sought to

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justify or palliate the alleged offense with the countercharge that during his previous incarceration his wife had been guilty of criminal intimacy with young Mahaney, the deceased, with the result that she was then pregnant, and to prove his assertion he compelled her to rise in the presence of the jury and pointed out her condition. In conversation with one Rush, a farmer by whom the defendant was employed at that time or soon thereafter, the latter told the former that "when he came out of the workhouse his wife admitted to him that she was in a family way, and Thomas Mahaney was the father of the child, and he said he was going to kill him, if he didn't kill him within ten years." At about that time the defendant also told one Rogers that the deceased was responsible for his wife's condition; that he had been running everywhere with her during the defendant's absence, and that he would "shoot the s—— of a b——." In the spring of 1898 the defendant applied to McLouth, the justice, for a peace warrant against the deceased, stating that the latter "abused him and wouldn't allow him to go in the road; that when he went anywhere he had to go cross lots; he didn't dare go in the road; he was afraid of him." Later in the same year the defendant was arrested for an alleged assault upon one Morris Mahaney. At that time he stated to the same justice of the peace "that Tom (the deceased) was the cause of all that trouble;" that he had sent Morris over to the defendant's place to break the windows so that the defendant would commit an assault upon Morris and then be arrested for it.

In January, 1900, the deceased was married to Mary Shea. The young couple at once took up their abode in the city of Rochester and remained away from Farmington until the fall of 1902, when they returned to reside upon the place where the deceased met his death. The record is silent as to this interval of about four years, until the deceased and his wife were about to return to Farmington in October, 1902, when the defendant had a conversation with one Ebert in the fruit evaporating establishment of one Johnson. Ebert stated that it was reported that the deceased was about to return to

Farmington, when the defendant said, "By God, if he comes back there I will put him out of the way," to which Ebert replied, "You had better keep your hands off from Tom, he's a pretty good man," and the defendant rejoined by saying, "I don't intend to put my hands on him to put him out of the way."

About a month before the deceased and his wife went back to Farmington, the elder Mahaney, father of the deceased, had a talk with the defendant. The latter said, "I hear Tom is coming back to live in the neighborhood; you tell Tom by God Almighty, if he ever comes to that street again, he won't last but a little while, and you be sure and tell it to him." The deceased and his wife returned to Farmington and took up their abode on the place where the former met his death. After they had lived there about four weeks the latter heard the defendant talking in the road. It was near midnight and was dark, so that she could not see him, but she knew his voice. She heard him say, "Mahaney, I will lay for you; I will serve twenty years for you; you're before me," or that in substance. At about this time the defendant went one evening to the house of Mrs. Mahaney, the mother of the deceased. He was intoxicated and, referring to the circumstance that the deceased had been a witness against him upon his trial for assault upon Morris Mahaney, he said he would "meet him some day for what he had done." Then there was an occasion when the defendant had a conversation at his home with one Nicholson, in which the former is quoted as saying that he would "take the liver and heart out of that man" (referring to the deceased) "and whittle it away as easily as he could whittle the stick that he held in his hand." Substantially of the same purport was another conversation between the defendant and the Brodericks, husband and wife, in which the defendant is charged with saying, "Tom Mahaney is a perjurer and he could take his knife and cut out his heart and chew it."

Coming down to a period about ten days before the homicide, the wife of the deceased testified that the defendant came

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home from town one night and his wife came out of the house to assist him in unhitching the horse. On that occasion she heard the defendant say "he had the ammunition to fix Mahaney now, and there were others he would fix with him; two or three others." That the defendant's wife spoke to him and told him to keep still, and he replied, "no, he wouldn't; he would fix him; he would shoot him." At about this same time the defendant, in a conversation with one Johnson, said that certain persons were meddling with his things and taking some of them, and he mentioned the names of Welch, John Mahaney and the deceased, saying: "They will find some one dead here if this thing continues."

A few days before the homicide the defendant, in a conversation with the Cornelius, father and son, said to the latter, "you are afraid of Tom Mahaney," and upon receiving a reply in the negative he said, "I will do away with the black cuss. I will do away with the black s—— of a b——."

We now pass to the consideration of the events of the fatal day. The defendant and his wife drove to Canandaigua. The time of their going and the duration of their stay is not definitely shown. They seem to have been there as late as between two and three o'clock in the afternoon, for Kelly, a saloonkeeper, says the defendant was at his place at that hour somewhat under the influence of liquor. Behrens and the two Cornelius, who were at work in a gravel pit near the homes of the Mahaneys and the Sextons, saw the defendant and his wife driving homeward a few minutes after four o'clock. The defendant's wife testified that they reached their house at about five o'clock, and this statement is corroborated by the daughter Anna, who assisted in unhitching the horse.

Here we pause to take up the movements of the deceased as disclosed by the record. He had been at work earlier in the day "drilling in" beans for farmer Edmonston, and returned home about three o'clock, bringing with him the latter's drill and drag and his own team. He started at once to "drag" a field that lay westerly from his house, leaving the drill at the barn. Having finished his "dragging," the

deceased returned to the house where his wife had been picking over beans that were to be "drilled" into the ground that had been prepared for them. He partook of a lunch, changed some of his outer clothing, hitched his team to the "drill", which had been filled with beans brought from Edmonston's, and then went back to the field, beginning to drill in the southwesterly corner where the westerly line, which separates the premises of the deceased from those of the defendant, runs on an angle that required the "drilling" of a number of short rows of varying length before this planting process could be continued in rows extending north and south from one end of the field to the other. The "drill" had been driven back and forth on these short rows four times and had been turned at a point as near as possible to the west fence of the deceased, when the shot was fired which caused his death, and the team started for the barn on a fast trot. This was at about five-thirty in the afternoon.

At this juncture it will be desirable to take a more critical view of the scene of the crime and its surroundings. The premises occupied by the deceased and his wife consisted of between five and six acres of land fronting on a road running north and south between Canandaigua, in the county of Ontario, and Palmyra, in the county of Wayne. Next north and fronting on the same road were the premises of the elder Mahaney, consisting of ten or twelve acres, and flanked on the north by a road running east and west. The premises of the defendant were next south of the premises of the deceased, fronting on the north and south road, extending westerly to the westerly line of the premises of the two Mahaneys, father and son, and from thence continuing southerly on an obtuse angle to the east and west road above mentioned, thus bounding the premises of the deceased both on the south and west. That portion of the defendant's lands which lay westerly of those occupied by the deceased consisted wholly of swamp, with the exception of a knoll about fourteen rods square, which had been planted with strawberries. The place where the body of the deceased was found is near the line

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which forms the western boundary of his premises and the eastern boundary of the land of the defendant. Along the line of the fence marking this boundary there are some bushes and a few swamp trees, which obstructed the view between the Mahaney land, where the body of the deceased was found, and the strawberry patch on the defendant's land. At a point six feet west of where the body of the deceased was found and fifteen inches west of this boundary fence there stood upon the defendant's land a small tree overgrown with young vines.

The gunshot report above referred to had been heard by a number of persons. One of these, Bertha McCauley, who lived to the northwest of the *locus in quo*, was picking cherries at that time. She saw the defendant coming down the path toward the swamp. Within fifteen minutes of her first sight of him she heard the report of a gun and then she saw Mahaney's team running towards the barn. At the coroner's inquest the defendant admitted that he had last seen the deceased alive at about five-thirty in the afternoon before, which was the day of the shooting; that the deceased was then "drilling" on the west side of his lot, and that he, the defendant, was then at the berry patch on his premises. The defendant's daughter saw him going toward the berry patch, and this is corroborated by his wife, although both of these witnesses say the defendant was carrying a berry crate, while that is denied by the witness McCauley who says she saw nothing in the defendant's hands. The defendant's daughter thought her father had returned to the house before she heard the shot, and at the coroner's inquest the defendant's wife testified that in the course of about one-half hour after she and her husband had returned from Canandaigua, the latter came into the house, when she asked him if he had heard a shot, to which he replied in the negative, and then he asked her if she had heard one, to which she said she had.

Meanwhile the wife of the deceased, having finished her task of picking over beans, started to take them out to the barn. There she saw the driverless team. In the same

instant Mrs. Mahaney, the mother of the deceased, came along, and a search was instituted which resulted in the finding of the body of the deceased at the place above indicated. The body lay on the stomach, with the left side of the face and head upon the ground in a pool of blood. The left temple had been shattered by a volley of shot, well bunched, most of them penetrating the superficial structure of the skin, and many more passing into and through the membrane of the brain. One hundred of these missiles were within an area of about two and one-half inches, extending from the top of the nose to the last posterior shell of the ear, and there were others scattered in the face, neck and scalp. The left eye had been punctured and a large portion of its contents had leaked out. The cause of death was plainly visible and unmistakable. The tree, above referred to as standing upon the land of the deceased at a point about fifteen inches from the barbed wire line fence and in a direct line between the strawberry patch and the place where the deceased had paused to turn his drill, had been perforated with shot, covering a space of about 65/100 of a foot in size, which was about five feet four inches from the ground, and the vine which clustered about the tree had been cut off at the same place.

The news of the tragedy spread rapidly, and soon the neighbors within a radius of half a mile or more gathered in the stricken home, but the Sextons, next door neighbors, were not there. At about seven o'clock in the evening Mrs. Behrens, who had been at the Mahaneys since the discovery of the tragedy, went after the Welchs, who were also neighbors. In going she passed the defendant who asked her what was the matter, to which she replied "nothing much," and in returning from the Welchs the party met the defendant who said to Welch, "Ed, don't go there." Later that night, at about eleven o'clock, when some of the neighbors were still at the Mahaneys, the defendant went to the house of Cornelius, who asked the defendant what he wanted, to which the latter replied, "Have you seen my wife? She is crazy, she is throwing things around the house, and has stole my gun and

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is shooting, shooting everybody. You know I have got a baby to nurse, come out and help me in my trouble." Half an hour later he appears at the door of the Mahaneys. A Mrs. Hughes, who was there, heard some one muttering outside of the house and went to the door where she found the defendant, who said, "I want my wife," and upon being told that she was not there he left the house. This is corroborated by the widow of the deceased, who heard Mrs. Hughes talking to some one to whom she said, "you are not wanted here." The significance of this testimony becomes apparent when we refer to the evidence of the defendant's wife, to the effect that after her return from Canandaigua she did not leave her house again that day.

Having thus outlined the salient circumstances and events which preceded and surrounded the homicide, it yet remains to summarize the circumstances bearing upon the character and ownership of the weapon by means of which the death of Mahaney is thought to have been effected. That Mahaney's death was caused by a shot from a gun loaded with No. 6 shot cannot be doubted. The character of the wound, the number and nature of the missiles found in the body, and the perforations and abrasions upon the tree and vine referred to, all preclude the possibility of any other hypothesis. That the defendant had possessed a shotgun as late as two weeks before the homicide can hardly be doubted, for his wife testified to that effect. She said it had disappeared at about that time with a razor and some other articles, and both Mr. and Mrs. Lawrence say the defendant told them the same story. Behrens had seen the defendant engaged in shooting with a shotgun back of the Cornelius barn a week or two before the homicide, and this is corroborated by the younger Cornelius, who says it was the same gun which he had frequently seen in the defendant's possession; that it was a twelve-gauge gun for which he at one time purchased some No. 6 shot at defendant's request. It also appears that the defendant borrowed a rifle from Mr. Lawrence about two weeks before the homicide, but it had been returned at least two days before

that event. After the homicide some empty twelve-gauge shells were found in the swamp and at other places on the defendant's premises. On the morning after young Mahaney's death his father found a twelve-gauge gun wad a little to the east of where the body had lain, and other gun wads of the same size were later found a foot or so west of the tree which had been perforated with shot. The gun which the defendant had owned was not found, and was not accounted for at the trial, except as stated in the testimony of the defendant's wife and of Mr. and Mrs. Lawrence.

Thus we have a story containing, in varying degree, the different elements which are essentials in a case of circumstantial evidence. A powerful motive, fed and fostered by the periodical recollection and recital of the decedent's supposed invasion of the defendant's connubial bed — a wrong which no man can ever forget and which few have ever attempted to forgive — ; a series of bitter denunciations and threats of violence against the deceased by the defendant, beginning soon after his discovery of the reputed liaison between his wife and the deceased, and continuing until the marriage of the latter and his removal from the neighborhood ; a renewal of these denunciations and threats when it was reported that the deceased had decided to come back to the neighborhood, and again continued practically down to the fatal day, under circumstances indicating that this was the subject uppermost in the defendant's mind when his passions were inflamed by indulgence in intoxicating liquor ; the sudden and mysterious disappearance of the shotgun which the defendant had owned and openly possessed for a long time down to within two weeks of the homicide ; the defendant's trip to Canandaigua on the day of the homicide and his return home somewhat the worse for liquor ; his presence in the swamp lot at the time of the shooting when he and the deceased were separated by only a few rods of space and no other human being was near ; the firing of the deadly charge and its train of indications pointing to the locality where the defendant was seen as the spot from whence the shot had

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proceeded; the defendant's aloofness and apparent indifference during the hours following the tragedy, when all the other neighbors of the bereaved family had gathered to assist and comfort them; his later visits that night to the homes of Cornelius and the deceased, pretending to be in search of his wife, who was then under his own roof where she had been every moment since the shooting; and his statement to the effect that his wife had stolen his gun and was threatening to shoot everybody, although he had said to the Lawrences two weeks before the homicide that his gun had disappeared. These facts and circumstances, uncontradicted and unexplained, were submitted to a jury of the defendant's peers, under a charge so fair and favorable that no exception was taken, and a verdict of guilty was rendered. After a most careful and searching scrutiny of this array of facts and circumstances, we find ourselves unable to assent to the appellant's contention that they are insufficient to sustain this judgment of conviction. The chain is not equally strong in all its parts, but it is so connected that we think it was competent for the jury to decide that, beyond every reasonable doubt and to the exclusion of every other hypothesis, the defendant was the guilty slayer of the defendant. With that decision, resting upon such a foundation, we have no power to interfere, unless the defendant's substantial rights have been injuriously affected in the conduct of the trial.

The learned counsel for the appellant has very ably presented for our consideration various objections, exceptions and alleged irregularities in the trial as grounds for the reversal of this judgment of conviction. Addressing ourselves first to his criticism that the general attitude of the learned trial justice, as evidenced by his rulings, his charge and his indulgence of the district attorney, was calculated to influence the jury against the defendant, we deem it no less a pleasure than a duty to say that rarely are we called upon to decide an appeal in a capital case in which there is so little to criticise upon these grounds. We have had frequent occasion of late to deprecate the methods employed by some district attorneys in crimi-

nal trials, and to disapprove of the complacency of some trial judges in dealing with the most obvious misuses of a public prosecutor's official prerogatives and powers. It is quite natural that the discussion of such matters in the opinions of courts should sometimes suggest to the members of the profession the idea of raising similar questions in cases where an impartial judicial examination will disclose but little to criticise and nothing to condemn. In such instances we should be no less willing to express our approval than we are in other circumstances to publish our denunciation of what is unfair, unprofessional or unjust. Applying this rule to the case at bar, we feel bound to say that we are impressed by the evident fairness and impartiality of the presiding justice. There was nothing in his attitude or rulings, as disclosed by the record, that suggests the slightest bias, and his charge to the jury was so judicial, so comprehensive and so free from error as to evoke no exception from a defendant's counsel whose zeal and learning have uncovered every possible point in the case. Nor can we find any just ground for unfavorable criticism of the district attorney's conduct of the trial. While a prosecuting officer is vested with some quasi-judicial powers which, in these days, are unfortunately quite as often honored in the breach as in the observance, we must not forget that the prosecution of crimes cannot be conducted in the carefully weighed and measured language of judicial opinions. The precise latitude within which prosecutions may properly be presented cannot be circumscribed by any exact standard, for no two cases are alike, and the courts have neither power nor inclination to regulate the manners and methods of district attorneys, so long as they do not openly offend against professional propriety or interfere with the due and orderly administration of criminal justice. We think that when the prosecution of the case at bar is subjected to the test of this necessarily flexible rule, it is but simple justice to say that the district attorney was no more zealous and no less judicial than he had a right to be.

The specific assignments of error urged upon our attention

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may be disposed of with a very brief discussion. It is said that the district attorney was permitted to cross-examine and impeach his own witnesses, the defendant's wife and daughter. The reason of the rule upon which that contention is based suggests the exceptions that are necessary to its practical application. The party who calls a witness certifies his credibility. Therefore, a witness may not be impeached by the party at whose instance he testifies. This general rule is subject, however, to the exception that, when a witness proves hostile or unwilling, the party calling him may probe his conscience or test his recollection, to the end that the whole truth may be laid bare; and the extent to which this may be done depends upon judicial discretion exercised in the light of the circumstances in which the question arises. That these two persons, wife and daughter of the defendant, were unwilling witnesses against him was manifest from their relations to him and from their apparent lack of recollection. It was, therefore, permissible for the district attorney to ply them with leading questions, and even to cross-examine them. (*Becker v. Koch*, 104 N. Y. 401; *People v. Kelly*, 113 N. Y. 647, 652.) It is to be observed, moreover, that the question is really academic, for these witnesses contradicted none of their earlier statements tending to favor the defendant, but simply reiterated them.

It is said that a map purporting to show the *locus in quo* was improperly admitted in evidence. The specific complaint in that behalf is that the map contained certain red lines designed to represent the path followed by the defendant in going from his house to the scene of the homicide. The answer to this objection is that, although the general features of the map were verified by the examination of the surveyor who made it, there is not a word of testimony in the record to indicate what these red lines referred to. They are not identified or characterized on the map itself, and no one examining it could form any definite idea as to the meaning or purpose of these lines. It may be added, also, that even if it were admitted that these lines indicated the path pursued by

the defendant, that circumstance would add nothing to the probative force of the People's evidence, since the defendant's presence in the strawberry patch at about the time of the homicide was proven out of his own mouth at the coroner's inquest and established upon this trial by the duly authenticated minutes of that proceeding.

It is also claimed that the learned trial court erroneously refused to permit defendant's counsel to cross-examine the People's witness, Jacob Cornelius, from the minutes of his evidence given at the coroner's inquest. It appears that the coroner, while a witness before the grand jury, inserted in his coroner's minutes the name "Thomas Cornelius, Jr.," upon a page which, but for such interlineation, would seem to have contained a continuation of the evidence of Jacob Cornelius given at the inquest. At the trial, during the cross-examination of this Cornelius, defendant's counsel put some questions to him which assumed that the statements appearing upon that part of the minutes referred to the evidence that had been given by him before the coroner. The witness was a Dutchman, illiterate and ignorant, and the examination had become badly involved, when the question arose whether that portion of the coroner's minutes referred to contained his evidence or that of Jacob Cornelius, Jr. This was the situation when the court intervened with the suggestion that the defendant's counsel could ask the witness about anything that he was understood to have testified to before the coroner, "but it is not fair to assume that he did make the statements before the Coroner that are under the name of Jacob Cornelius, Jr. You may ask him, however, if he made those statements in view of the fact of these corrections." While the confusion caused by the coroner's interlineation of the name "Thomas Cornelius, Jr.," in his minutes does not appear to have been very satisfactorily cleared up, it is evident from the trial court's concluding sentence above quoted that the defendant's counsel was in fact not deprived of any opportunity to cross-examine Jacob Cornelius. The only limitation imposed by the court was one that seems to have been proper

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under the circumstances, and we, therefore, conclude that this ruling was not erroneous or prejudicial to the defendant.

It is further urged that the defendant was deprived of a substantial right in the denial of his motion to dismiss the indictment upon which he was tried. This motion was made, not at the trial of the defendant, but at a previous term of the court held by Mr. Justice DAVY, and upon three separate grounds: 1. That improper and illegal evidence was introduced before the grand jury. 2. That the statements of two unsworn witnesses were received by the grand jury without any effort by the court to ascertain whether these witnesses, being children under twelve years of age, understood the nature of an oath, and, if not, whether they were possessed of sufficient intelligence to justify the reception of their evidence. 3. That the legal evidence produced before the grand jury was insufficient to warrant the finding of an indictment. Neither of the grounds upon which this motion was made is recognized by the Code of Criminal Procedure (Sec. 313) as a sufficient reason for setting aside an indictment; but in the case of *People v. Glen* (173 N. Y. 400) we had occasion to pass upon the validity of that section. It was there decided to be clearly within the legislative power to restrict the grounds upon which such a motion could be made, so long as the restraint imposed related solely to matters of practice or procedure, but that the section referred to was not intended to affect, and could not curtail, any of the constitutional rights of an indicted defendant. At least two of the grounds upon which the motion was made to dismiss the indictment herein do relate to the defendant's constitutional rights, for a grand jury can receive none but legal evidence (Code Crim. Pro. sec. 256) and should only find an indictment when all the evidence, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by a trial jury. (Code Crim. Pro. sec. 258.) Whenever it clearly appears, therefore, that the legal evidence received by a grand jury is insufficient to support an indictment; or that illegal evidence is the sole basis for

an indictment, the person indicted has a constitutional right to make a motion to dismiss, notwithstanding the provisions of the Code to the contrary. The right to make a motion upon these substantial grounds, and to have it decided in the first instance, necessarily implies the right to have a review of an adverse decision, at least in the absence of any statutory limitation, and so we will treat this as one of the questions that may be reviewed by this court upon appeal from a judgment of conviction in a capital case. While this somewhat extended preliminary discussion of the question is pertinent upon the defendant's right to have a review of the denial of his motion to dismiss the indictment, it is really of little practical importance when considered in the light of the record. The averments of the affidavits upon which the motion was made were vague and unsatisfactory. The court's attention was directed to no illegal evidence that was presented to the grand jury, and the very general charge that the evidence was insufficient is supported by no direct or definite statement. In short, the moving affidavits are simply a collection of the broadest generalizations stated upon information and belief. The learned trial justice before whom the motion was made had the minutes of the grand jury before him. He decided that the evidence was sufficient to sustain the indictment, and that none of the evidence was illegal. That decision is clearly supported by the record before us, and it is also fortified by the presumption that an indictment is found upon legal and sufficient evidence. (*People v. McIntyre*, 1 Parker's Cr. Rep. 372; *U. S. v. Wilson*, 6 McLean, 611.)

There is yet another phase of the motion to dismiss the indictment that needs to be briefly considered. It is said that two of the children of the defendant, one of them nine years of age and the other only six, were witnesses before the grand jury, although they were neither sworn nor examined by the justice who presided at the term during which the indictment against the defendant was found. The Code of Criminal Procedure (Sec. 392) provides that "whenever in any

criminal proceedings a child actually or apparently under the age of twelve years offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence." As we understand the argument of the learned counsel for the appellant it is, in substance, that the evidence of these children could not legally be received by the grand jury until after such a preliminary examination as is provided for in section 392, and that no one had the right to make that examination but the justice who presided at that term of court. If we assume for the instant the soundness of counsel's contention, that does not affect the validity of the indictment. The justice before whom the motion to dismiss was made and who examined the grand jury's minutes decided that there was sufficient other evidence to sustain the indictment. That is in accord with the general rule which is well expressed in Underhill's work on Criminal Evidence (Sec. 26), as follows: "The fact that some incompetent evidence was received in connection with competent evidence, or an incompetent witness examined, is not ground for quashing an indictment, for these errors may be corrected upon the trial." But we do not think it is necessary to dispose of the question upon this last-mentioned ground. A grand jury, although for some purpose a part of the court in connection with which it is convened, is in some aspects a separate and independent tribunal, free from the restraint of the court, and at liberty to decide upon its own methods of procedure in so far as they are not controlled by statute or immemorial usage having the force of law. One of the attributes and powers of this independent existence is to decide when and in what order witnesses shall be called, and, to some extent, who shall be called. For all the ordinary purposes of procuring evidence

a grand jury is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules. The court has no general control over witnesses summoned before a grand jury except to punish them for contumacy or contempt, and we cannot see upon what theory it could be held that a grand jury has not the power to determine for itself the qualifications of witnesses of tender years so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances. It requires no violent stretch of language or of legal rules to apply the terms of the statute (Code Crim. Pro. sec. 392) to grand juries as well as to courts and magistrates, and when that is done it ends the discussion here, for we are informed by the district attorney's affidavit that the statute was literally complied with in the examination of these children. The statute authorizing the reception of the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen. (*People v. Johnson*, 185 N. Y. 228.)

Other matters are pressed upon our attention by the able and zealous counsel for the appellant, but we do not regard them as of sufficient importance to justify the further continuance of this discussion. Having reviewed this case with a full realization of the solemn responsibility that attends an issue of life and death, our duty compels us to decide that the evidence is sufficient to support the judgment of conviction herein, and that the record discloses no errors which will warrant the reversal of that judgment.

CULLEN, Ch. J., GRAY, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur; VANN, J., not voting.

Judgment of conviction affirmed.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

**ALICE WILCOX, Respondent, v. NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Appellant.**

Wilcox v. N. Y. C. & H. R. R. Co., 111 App. Div. 998, affirmed.
(Argued December 10, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 10, 1906, affirming a judgment of the Monroe County Court which affirmed a judgment in favor of plaintiff entered upon a decision of the Municipal Court of the city of Rochester in an action to recover for the loss of certain articles alleged to have been stolen from a trunk while in possession of the defendant.

Daniel M. Beach for appellant.

George Raines and *H. W. Rippey* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,
WERNER and CHASE, JJ. Not sitting: GRAY and HISCOCK,
JJ.

**WILLIAM WILLIAMS, Appellant, v. CHARLES R. BUCKLEY
et al., Respondents.**

Williams v. Buckley, 100 App. Div. 517, affirmed.
(Argued December 10, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1905, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special

Term in an action to set aside a deed and will on the ground of incompetency and undue influence.

F. J. Moissen for appellant.

W. P. Prentice and *R. K. Prentice* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

WILLIAM H. McWHIRTER, Respondent, *v.* ABNER T. BOWEN et al., Appellants.

ALVIN EISERT, Respondent, Impleaded with Another.

McWhirter v. Bowen, 103 App. Div. 447, affirmed.

(Submitted December 10, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 23, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to enforce a written agreement and for an accounting.

Henry B. Johnson, *William L. Marshall* and *John J. Cunneen* for appellants.

James M. Fisk for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

NEW YORK WATER COMPANY, Respondent, *v.* ELIZABETH H. CROW, Defendant.

AMERICUS F. CALLAHAN et al., Appellants, Impleaded with Others.

New York Water Co. v. Crow, 110 App. Div. 32, affirmed.

(Argued December 10, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

January 6, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to establish a trust in certain premises which had been conveyed to defendants Crow.

John J. Crawford and *Arthur C. Hume* for appellants.

William C. Prime and *Henry H. Pierce* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

ABRAHAM DUBROFF, Appellant, v. CURTIS BROTHERS' LUMBER COMPANY, Respondent.

Dubroff v. Curtis Brothers' Lumber Co., 106 App. Div. 611, affirmed.
(Submitted December 11, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 13, 1905, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover for breach of contract.

Isaac N. Miller and *Herman G. Loew* for appellant.

George F. Alexander for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

MARY L. CILLEY, Respondent, v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK, Appellant.

Cilley v. Preferred Accident Ins. Co., 109 App. Div. 394, affirmed.
(Argued December 12, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

December 5, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of accident insurance.

Walter S. Hubbell for appellant.

Nathaniel W. Norton for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

THE PEOPLE'S BANK OF BUFFALO, Appellant, *v.* GEORGIE L. CUSHMAN, Respondent, Impleaded with Another.

People's Bank of Buffalo v. Cushman, 109 App. Div. 349, affirmed.
(Argued December 12, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 22, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term in an action to subject the proceeds of certain life insurance policies to the payment of a judgment recovered against the beneficiary.

Lyman M. Bass for appellant.

Vernon Cole and *Moses Shire* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

JAMES V. FALVEY, Respondent, *v.* SAMUEL WOOLNER, Appellant.

Falvey v. Woolner, 110 App. Div. 892, affirmed.
(Argued December 13, 1906; decided January 8, 1907.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

January 16, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for breach of contract.

Charles F. Brown, Levy Mayer, Allan McCulloh and Alfred S. Austrian for appellant.

Henry L. Scheuerman and Charles L. Craig for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

JOHN M. DANA, Respondent, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Dana v. N. Y. C. & H. R. R. Co., 108 App. Div. 358, affirmed.
(Argued December 18, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 25, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Edward Harris, Jr., for appellant.

Clarence W. McKay for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: GRAY and HISCOCK, JJ.

HARRIET A. TILTON, Respondent, *v.* JOHN B. MURRAY, Appellant, Impleaded with Others.

Tilton v. Murray, 108 App. Div. 366, affirmed.
(Argued December 14, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 17, 1905, affirming a judgment in favor of plain-

tiff entered upon a decision of the court at a Trial Term without a jury in an action upon a promissory note.

Charles L. Andrus and *David Murray* for appellant.

Henry L. Scheuerman, *Henry Siegrist, Jr.*, and *Jacob Newman* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

MICHAEL COLEMAN, Respondent, *v.* INTERURBAN STREET RAILWAY COMPANY, Appellant.

Coleman v. Interurban Street Ry. Co., 111 App. Div. 915, affirmed.
(Argued December 14, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 5, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

E. D. O'Brien, *Bayard H. Ames*, *Walter H. Wood* and *Henry A. Robinson* for appellant.

John C. Robinson for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Not sitting: O'BRIEN, J.

JUSTUS HEILBRONN et al., Respondents, *v.* ABRAHAM S. HERZOG, Appellant.

Heilbronn v. Herzog, 103 App. Div. 595, affirmed.
(Argued December 14, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 16, 1905, affirming a judgment in favor of plaintiffs

entered upon a verdict and an order denying a motion for a new trial in an action to recover for goods sold and delivered.

Julius J. Frank for appellant.

Benjamin N. Cardoso and *Meyer M. Friend* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

HUBIN M. CLEMENTS, Appellant, v. B. SHEERWOOD-DUNN, Respondent, Impleaded with Another.

Clements v. Sheerwood-Dunn, 108 App. Div. 327, affirmed.
(Argued December 17, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 15, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial in an action to enforce specific performance of an alleged oral contract for services.

Thomas D. Adams and *A. C. Palmer* for appellant.

Hubert E. Rogers for respondent.

Order affirmed and judgment absolute ordered against appellant, on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ.

ANNA M. HEDSTROM et al., Appellants, v. GEORGE D. HARRIS et al., Respondents.

Hedstrom v. Harris, 108 App. Div. 358, affirmed.
(Argued December 17, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 13, 1905, affirming a judgment in favor of defend-

ants entered upon a verdict directed by the court in an action to recover an amount alleged to be due for goods sold and delivered.

George P. Keating and William A. Douglas for appellants.

Patrick C. Dugan for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, WERNER and CHASE, JJ. Dissenting: GRAY, J. Not voting: EDWARD T. BARTLETT, J. Not sitting: HISCOCK, J.

JOHN P. DUFFGHE, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Duffghe v. Metropolitan Street Ry. Co., 109 App. Div. 608, affirmed. (Argued December 18, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 14, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

J. L. Quackenbush, Bayard H. Ames, Anthony J. Ernest and Henry A. Robinson for appellant.

George C. De Lacy, William C. Beecher and J. Elmer Melick for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ. Not sitting: GRAY, J.

OWEN McNALLY, Appellant, v. JAMES E. MANSFIELD, as Mayor of the City of Oswego, et al., Respondents.

McNally v. Mansfield, 105 App. Div. 629, affirmed. (Argued December 18, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

June 5, 1905, which affirmed a judgment of Special Term sustaining a demurrer to and dismissing the complaint in a taxpayer's action to restrain the issuance and sale of bonds of the city of Oswego.

F. T. Cahill for appellant.

Merrick Stowell and *Francis D. Culkin* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

MARTIN J. FRICK et al., as Executors of MARTIN FRICK, Deceased, et al., Respondents, v. MYRA J. SCHENCK et al., Individually and as Executrices of MYRA J. SCHENCK, Deceased, et al., Appellants.

Frick v. Schenck, 105 App. Div. 628, affirmed.

(Argued December 18, 1906; decided January 8, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1905, which modified and affirmed as modified an interlocutory judgment of an Equity Term construing the will of John Frick, deceased.

The following questions were certified:

"1. Do the surrogate's decrees of 1886, 1896 and 1898, or any of them, constitute a bar to the plaintiffs' cause of action?

"2. Are plaintiffs estopped from denying the widow's claim to the fee by reason of their own laches; by reason of the operation of the Statute of Limitations, lapse of time, of adverse possession, or on account of equitable estoppel?

"3. Is the action properly before the court in not having been brought by or against the administrator with the will annexed of John Frick, deceased?

"4. Under the proof did the widow take title to the fee of

the homestead farm by operation of law as tenant of the entirety irrespective of the will?

"5. If the will be a proper subject for construction at this time, did the widow take a life estate only; a life estate with power to take of the principal, and if so, to what part of the principal was she restricted under the will, or did she take the fee?"

Edward E. Tanner for appellants.

Adelbert Moot and *Helen Z. M. Rogers* for respondents.

Interlocutory judgment affirmed, with costs. First and second questions certified answered in the negative. Third question answered in the affirmative. Fifth question answered as follows: The widow took a life estate, with power of sale, and was entitled to use the principal thereof for her maintenance, the remainder at her death being given equally to testator's three brothers. The fourth question, not having been passed upon by the Appellate Division, is not answered; no opinion.

Concur: CULLEN, CH. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

RANSOM FRALICK, as President of the PROGRESSIVE SPIRITUALISTS' ASSOCIATION OF WAVERLY, N. Y., Appellant, v. FRED E. LYFORD et al., as Executors of JAMES R. PARK, Deceased, Respondents.

Fralick v. Lyford, 107 App. Div. 548, affirmed.

(Argued December 19, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered October 24, 1905, reversing a judgment in favor of plaintiff entered upon the decision of the court at a Trial Term without a jury and granting a new trial in an action to recover an

amount claimed as a legacy under the will of James R. Park, deceased.

Louis L. Waters for appellant.

Frederick Collin for respondents.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Not sitting: CHASE, J.

THE GREENWICH INSURANCE COMPANY, Appellant, v. OGDENSBURG POWER AND LIGHT COMPANY, Respondent.

Greenwich Ins. Co. v. Ogdensburg Power & Light Co., 106 App. Div. 616, affirmed.

(Submitted December 20, 1906; decided January 8, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered August 15, 1905, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover an amount paid under a policy of fire insurance, by reason of a loss alleged to have been occasioned by defendant's negligence.

John Notman and *George E. Van Kennen* for appellant.

R. E. Waterman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Not sitting: CHASE, J.

PHILLIP A. WILLIAMS, JR., et al., Appellants, v. HELEN M.
GRIDLEY, Respondent.

Williams v. Gridley, 110 App. Div. 525, affirmed.
(Argued December 21, 1906; decided January 8, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 3, 1906, reversing a judgment in favor of plaintiffs entered upon the report of a referee, and granting a new trial in an action to recover for breach of contract.

A. C. Stevens and *B. J. Shove* for appellants.

C. A. Hitchcock for respondent.

Order affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

GEORGE P. BUTLER, Appellant, v. RICHARD H. WRIGHT,
Respondent.

(Submitted December 17, 1906; decided January 8, 1907.)

Motion for re-argument denied, with ten dollars costs.
(See 186 N. Y. 259.)

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respond-
ent, v. THE BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF NEW YORK et al., Appellants.

People ex rel. N. Y. C. & H. R. R. Co. v. Bd. Railroad Comrs., 113
App. Div. 895, appeal dismissed.

(Argued January 14, 1907; decided January 15, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June

15, 1906, which affirmed an order of Special Term denying a motion to quash a writ of certiorari.

John A. Barhite and Horace G. Pierce for appellants.

Daniel M. Beach for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

GEORGE D. REED et al., Respondents, *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant, Impleaded with Others.

Reported below, 116 App. Div. 921.

(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the appellant had failed to perfect the appeal within a time stipulated.

George D. Reed for motion.

Chauncey J. Hamlin opposed.

Motion denied on payment by appellant of ten dollars costs within ten days; the undertaking filed to stand subject to justification if excepted to.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* JAMES W. SIMPSON, Respondent.

People v. Simpson, 115 App. Div. 889, appeal dismissed.

(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial

department, entered October 18, 1906, which affirmed an order of Special Term granting a motion for leave to inspect the minutes of the grand jury.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Martin T. Manton for motion.

No one opposed.

Motion granted and appeal dismissed.

RASTUS S. RANSOM et al., Respondents, v. ROBERT L. CUTTING, Appellant, and FARMERS' LOAN AND TRUST COMPANY, Respondent.

Reported below, 112 App. Div. 150.

(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 10, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the appeal was from a unanimous judgment of affirmance in an action to recover for services; that permission to appeal had not been given and no questions of law were involved that could be reviewed.

Mahlon A. Freeman for motion.

Robert L. Cutting opposed.

Motion denied, with ten dollars costs.

ROSE FREY, Appellant, v. FRANCOINE FOUGERA et al., as Administrators of the Estate of CECILE L. FOUGERA, Deceased, Respondent.

Reported below, 113 App. Div. 912.
(Submitted January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1906, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the Court of Appeals had no jurisdiction to entertain the appeal, permission to appeal not having been granted, and the appeal not coming within the provisions of subdivision 2 of section 191 of the Code of Civil Procedure.

Charles F. Brandt for motion.

James C. De La Mare opposed.

Motion denied, with ten dollars costs.

CHARLES H. MACDONALD, Respondent, v. DREAMLAND, Appellant.

Macdonald v. Dreamland, 114 App. Div. 919, appeal dismissed.
(Submitted January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 1, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the judgment was not appealable of right to the Court of Appeals, and permission to appeal had not been granted.

Samuel T. Carter, Jr., for motion.

No one opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

ROBERT H. PEARSON, Respondent, v. JOHN J. COLLINS, JR., as Executor of DAVID PEARSON, Deceased, Defendant, and ST. MARY'S HOSPITAL OF THE CITY OF BROOKLYN, Appellant, Impleaded with Others.

Pearson v. Collins, 118 App. Div. 657, appeal dismissed.
(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 25, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Omar Powell for motion.

John R. Kuhn opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion, on the ground that the judgment sought to be reviewed is simply an interlocutory judgment.

HENRY KELLER, as Executor of MARY BRECHTLEIN, Deceased, Respondent, v. THE GREENWOOD CEMETERY, Appellant.

Brechtlein v. Greenwood Cemetery, 118 App. Div. 911, appeal dismissed.
(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 18, 1906, affirming a judgment in

favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Henry F. Cochrane for motion.

J. W. Welch opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

THERESA STORM et al., Appellants, v. SOPHIA MCGROVER et al.,
Individually and as Administrators of **CAROLINE PREISS,**
Deceased, et al., Respondents.

Reported below, 70 App. Div. 88.

(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 12, 1902, reversing an interlocutory judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and granting a new trial.

The motion was made upon the ground that the appeal had been erroneously taken, the Court of Appeals not having jurisdiction to entertain the same.

Robert H. Barnett for motion.

Eugene Cohn and *Frank M. Patterson* opposed.

Motion denied, without costs.

CORNELIUS MACARDLE et al., as Administrators of CORNELIUS MACARDLE, Deceased, Suing on Behalf of Themselves and Other Stockholders of THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, Appellants, v. FREDERIC P. OLCOTT, Respondent.

MacArdle v. Olcott, 114 App. Div. 906, appeal dismissed.

(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered October 29, 1906, which granted a motion to amend a previous order of affirmance of that court so as to show that said order was unanimous.

The motion was made on the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Arthur H. Van Brunt for motion.

H. Snowden Marshall opposed.

Motion granted and appeal dismissed, with ten dollars costs.

LEWIS VAN ALLEN, Appellant, *v.* CHARLES M. PEABODY et al., as Executors of WILLIAM H. PEABODY, Deceased, Respondents.

Van Allen v. Peabody, 112 App. Div. 57, appeal dismissed.
(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 6, 1906, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial.

The motion was made upon the ground that the required undertaking had not been served or filed.

William D. Van Pelt for motion.

No one opposed.

Motion granted and appeal dismissed, with ten dollars costs.

WILLIAM OPPENHEIM, Respondent, *v.* JOHN MCGOVERN, Appellant.

Reported below, 115 App. Div. 135.
(Submitted January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 24, 1906, affirming a judgment in

favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The motion was made upon the grounds that the judgment was not appealable of right to the Court of Appeals, that permission to appeal had not been granted and that the appellant's exceptions were frivolous.

Morton Stein for motion.

John P. Everett opposed.

Motion denied, with ten dollars costs.

FRANK A. WEDDIGAN et al., Respondents, v. WILLIAM F. WHITING, Appellant.

Weddigan v. Whiting, 114 App. Div. 915, appeal dismissed.
(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 21, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the appeal was improperly taken.

E. C. Aiken for motion.

Charles F. Lyon opposed.

Motion granted and appeal dismissed, without costs.

JAMES S. MCGLENNON, Respondent, v. CHASE BROTHERS COMPANY, Appellant.

Reported below, 115 App. Div. 921.
(Argued January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial

department, entered November 26, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the grounds that the action was one for services, the affirmance by the Appellate Division unanimous and, therefore, not appealable under subdivision 2, section 191 of the Code of Civil Procedure.

George D. Reed for motion.

Horace McGuire opposed.

Motion denied, with ten dollars costs.

HOWARD COHEN et al., Respondents, v. CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Appellant.

Reported below, 114 App. Div. 117.

(Submitted January 7, 1907; decided January 15, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1906, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

The motion was made upon the grounds that the judgment was not appealable; that there were no questions of law for review and that the exceptions were frivolous.

Victor E. Whitlock and *William V. Goldberg* for motion.

Edgar J. Nathan and *Ernest A. Cardozo* opposed.

Motion denied, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ROBERT F. O'CONNELL, Appellant, v. NICHOLAS J. HAYES, as Fire Commissioner of the City of New York, Respondent.

People ex rel. O'Connell v. Hayes, 111 App. Div. 925, affirmed.

(Submitted January 7, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered Feb-

ruary 23, 1906, which dismissed a writ of certiorari to review the proceedings of the defendant in dismissing the relator from the fire department of the city of New York and affirmed said proceedings.

Charles H. Collins for appellant.

John J. Delany, Corporation Counsel (Theodore Connolly and Royal E. T. Riggs of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* LOUIS C. CONNOLLY, Appellant, *v.* THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent.

People ex rel. Connolly v. Bd. Education, New York City, 114 App. Div. 1, affirmed.

(Submitted January 7, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the reinstatement of the relator as auditor of the board of education of the city of New York.

A. S. Gilbert and *Thomas F. Gilroy, Jr.*, for appellant.

William B. Ellison, Corporation Counsel (Theodore Connolly and John F. O'Brien of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD H. LITCHFIELD et al., Appellants, v. FRANK A. O'DONNEL et al., Constituting the Board of Taxes and Assessments of the City of New York, Respondents.

People ex rel. Litchfield v. O'Donnel, 113 App. Div. 713, affirmed.
(Argued January 8, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1906, which reversed an order of Special Term denying a motion to quash a writ of certiorari to review assessments for taxation for the year 1905 upon property of the relators and granted such motion.

William C. De Witt for appellants.

William B. Ellison, Corporation Counsel (*George S. Coleman* and *Curtis A. Peters* of counsel), for respondents.

Order affirmed, without costs, on authority of *People ex rel. Washington Building Co. v. Feitner* (163 N. Y. 384) and *People ex rel. Zollikoffer v. Feitner* (172 N. Y. 618); no opinion.

CONCUR: CULLEN, CH. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD H. LITCHFIELD et al., Appellants, v. JAMES L. WELLS et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

People ex rel. Litchfield v. Wells, 115 App. Div. 889, affirmed.
(Argued January 8, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 17, 1906, which affirmed an order of Special Term granting a motion to quash a writ of certiorari to review assess.

ments for taxation for the year 1903 upon property of the relators.

William C. De Witt for appellants.

William B. Ellison, Corporation Counsel (*George S. Coleman* and *Curtis A. Peters* of counsel), for respondents.

Order affirmed, with costs, on authority of *People ex rel. Washington Building Co. v. Feitner* (163 N. Y. 384) and *People ex rel. Zollikoffer v. Feitner* (172 N. Y. 618); no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Application of HENRY BUFTON,
Respondent.

WILLIAM RANDALL, Appellant.

Matter of Bufton, 118 App. Div. 890, affirmed.
(Argued January 8, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1906, which affirmed an order of Special Term directing the clerk of the town of Parma to call a special town meeting for the resubmission of questions relating to the sale of liquor in that town.

George D. Forsyth for appellant.

Albert H. Stearns for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM RANDALL, Appellant, v. JAMES H. GOODINO et al., Composing the Board of Canvassers of the Third Voting District of the Town of Parma, Respondents.

People ex rel. Randall v. Goodino, 118 App. Div. 891, appeal dismissed. (Argued January 8, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1906, which affirmed an order of Special Term denying an application for a peremptory writ of mandamus to compel the defendants to reassemble and recanvass the vote cast in the third voting district of the town of Parma at the town meeting held November 7, 1905.

George D. Forsyth for appellant.

Albert H. Stearns for respondents.

Appeal dismissed, without costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

J. EVANS GITTINGS, Appellant, v. WILLIAM H. RUSSEL, Respondent.

Gittings v. Russel, 114 App. Div. 405, affirmed. (Submitted January 8, 1907; decided January 22, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of Special Term vacating a judgment heretofore entered in the above-entitled action by default on the ground of lack of jurisdiction.

The following question was certified:

"Were the warrant of attachment and the notice served by the sheriff sufficient to give to the Trust Company of

America notice that the defendant herein had an individual interest in the estate of Kate B. Russel, William H. Russel, Administrator, and was an effective levy made?"

Henry M. Earle and *William Steele Grey* for appellant.

Cyrus C. Miller and *Charles B. Bretzfelder* for respondent.

Order affirmed, with costs, on opinion below. Question certified answered in the negative.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE UNITED CONSTRUCTION COMPANY, Appellant, v. WILLIAM B. VOORHIES et al., Composing the Town Board of the Town of Rockland, Respondents.

People ex rel. United Constr. Co. v. Voorhies, 114 App. Div. 351, affirmed (Argued January 8, 1907; decided January 22, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 9, 1906, which dismissed a writ of certiorari and confirmed a determination of the defendants in rejecting a certain claim of the relator against the town of Rockland.

Henry D. Merchant, *Abel Merchant, Jr.*, and *Rollin B. Sanford* for appellant.

Jacob M. Maybee, and *George H. Carpenter* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

ERNST THALMANN et al., Composing the Firm of LADENBURG, THALMANN & Co., Appellants, v. THE IMPORTERS AND TRADERS' NATIONAL BANK OF NEW YORK et al., Respondents, Impleaded with Another.

Thalmann v. Importers & Traders' Nat. Bank, 108 App. Div. 364, affirmed.

(Argued December 19, 1906; decided January 29, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover money alleged to have been obtained from plaintiffs by fraudulent means.

J. Markham Marshall, John E. Parsons and Fred B. Van Vorst for appellants.

Delos McCurdy for respondents.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, WERNER and CHASE, JJ. Dissenting: CULLEN, Ch. J., EDWARD T. BARTLETT and HISCOCK, JJ.

JOHN C. CASSIDY, as Trustee for CASSIDY & SON MANUFACTURING COMPANY, et al., Respondents, v. CHARLES SAUER et al., Defendants, and WALTER A. PARCE et al., Appellants.

Cassidy v. Sauer, 114 App. Div. 673, affirmed.

(Argued January 9, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 12, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action to rescind a contract for the sale of land.

The following questions were certified:

"*First.* Is there a defect of parties plaintiff?

"*Second.* Is there a misjoinder of parties plaintiff?

"*Third.* Does the complaint in this action state a cause of action in these plaintiffs?"

Merton E. Lewis, Walter S. Hubbell and Clarence E. Shuster for appellants.

P. M. French, Charles A. Boston and William M. Chadbourne for respondents.

Order affirmed, with costs; first and second questions certified answered in the negative; third question in the affirmative; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Accounting of THOMAS WATSON et al.,
as Executors of JOSEPH CORBIT, Deceased, Appellants.

JANE BUNNELL et al., Respondents.

Matter of Watson, 115 App. Div. 310, affirmed.

(Argued January 9, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1906, which affirmed a decree of the New York County Surrogate's Court judicially settling and surcharging the accounts of the executors of Joseph Corbit, deceased.

Henry A. Forster and John A. Weekes for appellants.

Richard R. Martin, Milton E. Robinson, Ellen T. Bennett and William E. Carnochan for respondents.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE CITY OF ROME, Respondent, v. THE WHITESTOWN WATER
WORKS COMPANY, Appellant, Impleaded with Others.

City of Rome v. Whitestown W. W. Co., 113 App. Div. 547, affirmed.
(Argued January 9, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1906, which affirmed a final order and an interlocutory judgment of Special Term entered upon the report of a referee in condemnation proceedings.

Thomas D. Watkins for appellant.

Oswald P. Backus and *John S. Baker* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT,
VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

IN the Matter of the Extension of HAMILTON STREET ACROSS
the Tracks of the NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY et al., Appellants, by THE VILLAGE
OF LA SALLE, Respondent.

Matter of Hamilton Street, 112 App. Div. 905, affirmed.
(Argued January 9, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 2, 1906, which affirmed a determination of the board of trustees of the village of La Salle extending Hamilton street in said village across the tracks of the appellants herein.

Maurice C. Spratt, *William L. Marcy*, *William M. Wheeler* and *Daniel J. Kenefick* for appellants.

Alfred W. Gray for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT,
VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

ANNIE HEDM, Appellant, v. ANTHONY SCHWOERER et al.,
Appellants.

RUDOLPH L. BLUMENTHAL, Respondent.

Hedm v. Schwoerer, 115 App. Div. 295, affirmed.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1906, which affirmed an order of Special Term denying a motion to compel the respondent to complete his purchase of certain property heretofore sold to him at a judicial sale pursuant to an interlocutory judgment of partition and relieving him of said purchase.

Henry C. Botty and *Jonas Ehrentreu* for appellants.

Charles E. Stern and *Charles Schwick* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

LILLIAN M. ROYCE, Respondent, v. THE BELL TELEPHONE
COMPANY OF BUFFALO, Appellant.

Royce v. Bell Telephone Co. of Buffalo, 115 App. Div. 920, affirmed.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 10, 1906, which affirmed an order of Special Term denying a motion to vacate a temporary injunction restraining the defendant from erecting a telephone line in front of plaintiff's premises.

The following questions were certified:

"*First*. Does the temporary injunction in this action suspend the ordinary and general business of the defendant corporation in violation of section 1809 of the Code of Civil Procedure?

"*Second.* Has the plaintiff an adequate remedy at law for the alleged unlawful acts of the defendant set forth in the complaint?"

John A. Barhite for appellant.

John D. Lynn for respondent.

Order affirmed, with costs, and questions certified answered in the negative; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

SARAH E. BUCKBEE, Appellant, v. THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, Respondent.

Buckbee v. Board of Education, N. Y. City, 115 App. Div. 366, affirmed.
(Argued January 10, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1906, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the answer and overruling such demurrer in an action to recover a balance alleged to be due for services.

The following question was certified:

"Is the new matter set up by way of defense in paragraph 2 of the defendant's answer to each of the causes of action set forth in the complaint a sufficient defense in law upon the face thereof?"

Theodore H. Lord and *John T. Little* for appellant.

William B. Ellison, Corporation Counsel (*Theodore Conolly* and *Stephen O'Brien* of counsel), for respondent.

Order affirmed, with costs, and question certified answered in the affirmative on opinion of CLARKE, J., below.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

BUFFALO GERMAN INSURANCE COMPANY, Respondent, *v.* THE TITLE GUARANTY AND TRUST COMPANY OF SCRANTON, PENNSYLVANIA, Appellant.

Buffalo German Ins. Co., v. Title G. & T. Co. of Scranton, 115 App. Div. 920, affirmed.

(Argued January 10, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 19, 1906, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the answer in an action to recover upon a surety bond.

The following question was certified:

"Is that part of the defendant's answer numbered 'Second' and designated a further and partial answer and defense, and consisting of new matter contained in said answer, sufficient in law upon the face thereof and a partial defense to the plaintiff's complaint in the action."

William H. Cuddeback for appellant.

Loren L. Lewis, Jr., and *William C. Carroll* for respondent.

Order affirmed, with costs, and question certified answered in the negative on opinion of KENEFICK, J., at Special Term.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* PATRICK A. MEEHAN, Appellant, *v.* FRANCIS V. GREENE, as Police Commissioner of the City of New York, Respondent.

People ex rel. Meehan v. Greene, 114 App. Div. 901, affirmed.

(Argued January 11, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 15, 1906, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York.

Jacob Rouss and *Louis J. Grant* for appellant.

William B. Ellison, Corporation Counsel (*Theodore Connoly* and *Royal E. T. Riggs* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not voting: WILLARD BARTLETT, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANIEL C. MOYNIHAN, Appellant, v. WILLIAM McADOO, as Police Commissioner of the City of New York, Respondent.

People ex rel. Moynihan v. McAdoo, 116 App. Div. 918, affirmed.
(Argued January 11, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 7, 1906, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York.

William C. De Witt and *Hersey Egginton* for appellant.

William B. Ellison, Corporation Counsel (*Theodore Connoly*, *Terence Farley* and *Royal E. T. Riggs* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Probate of the Will of JOHANNA COONEY,
Deceased.

THOMAS F. HICKEY et al., as Executors and Trustees et al.,
Appellants; JAMES LAMBERT, Respondent.

Matter of Cooney, 115 App. Div. 895, affirmed.
(Submitted January 11, 1907; decided January 29, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

October 13, 1906, which affirmed a decree of the Monroe County Surrogate's Court declaring void the residuary clause of the will of Johanna Cooney, deceased.

John B. Kiley for appellants.

Ernest B. Millard for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

WILLIAM C. ADAMS et al., Respondents, *v.* ELIAS L. M. BRISTOL, Appellant, et al., Respondents.

Adams v. Adams, 114 App. Div. 390, affirmed.

(Argued January 11, 1907; decided January 29, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an interlocutory judgment of Special Term directing a sale of certain real estate in partition.

David McClure and *Arthur O. Townsend* for appellant.

Payson Merrill for respondents.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Application of BUFFALO, LOCKPORT AND ROCHESTER RAILWAY COMPANY, Respondent, for the Appointment of Commissioners.

WILSON H. MOORE, Appellant.

Matter of Buffalo, L. & R. Ry. Co., 116 App. Div. 922, appeal dismissed.

(Submitted January 21, 1907; decided January 29, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial depart-

ment, entered December 19, 1906, which appointed commissioners to determine whether the petitioner's proposed railroad ought to be constructed in State street, in the village of Brockport.

The motion was made upon the ground that the order was not appealable to the Court of Appeals.

Charles B. Hill for motion.

John Pallace, Jr., opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

WILLIAM D. BAKER, Respondent, *v.* D. APPLETON &
COMPANY, Appellant.

Baker v. Appleton & Co., 107 App. Div. 358, affirmed.
(Argued January 14, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 14, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for breach of contract of employment.

William V. Rowe and *William F. Corliss* for appellant.

Jabish Holmes and *Ephraim Williams* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,
VANN, WERNER, HISCOCK and CHASE, JJ.

JOHN HOFMAN COMPANY, Respondent, *v.* EDWARD MURPHY, 2D,
et al., Appellants.

John Hofman Co. v. Murphy, 111 App. Div. 908, affirmed.
(Argued January 14, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

January 19, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action of replevin.

H. D. Bailey and *John T. Norton* for appellants.

John A. Barhite for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

CATHARINE McNEIL, Appellant, v. DANIEL HALL, Respondent.

McNeil v. Hall, 107 App. Div. 36, affirmed.

(Argued January 15, 1907; decided February 1, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 11, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial, and granted a new trial in an action for conversion.

Moses Shire and *Vernon Cole* for appellant.

C. W. Stevens and *Fred A. Robbins* for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

EDWIN L. THORNTON, Respondent, v. THE CITY OF AUBURN, Appellant.

Thornton v. City of Auburn, 107 App. Div. 621, affirmed.

(Argued January 15, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 19, 1905, affirming a judgment in favor of plaintiff entered upon

a decision of the court on trial at Special Term in an action to recover for the alleged diversion of water from a stream flowing across plaintiff's land.

William S. Elder for appellant.

Charles F. Lyon for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

RACQUETTE FALLS LAND COMPANY, Respondent, v. ALBERT HOYT et al., Appellants.

Racquette Falls Land Co. v. Hoyt, 109 App. Div. 119, affirmed.
(Argued January 15, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for an alleged trespass in cutting and removing timber from lands alleged to be the property of the plaintiff.

E. C. Emerson for appellants.

George N. Ostrander for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

ROMAIN POYET, as Administrator of the Estate of ULISSES POYET, Deceased, Respondent, v. CHARLES ROHE, Doing Business under the Name of ROHE & BROTHER, Appellant.

Poyet v. Rohe, 110 App. Div. 892, affirmed.
(Argued January 15, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 12, 1906, affirming a judgment in favor of plaintiff

entered upon a verdict and an order denying a motion for a new trial in an action to recover for the alleged negligent killing of plaintiff's intestate.

Edwin A. Jones for appellant.

Willard N. Baylis for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, HISCOCK and CHASE, JJ. Dissenting: GRAY and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM GILHOOLEY, Appellant.

People v. Gilhooley, 108 App. Div. 284, affirmed.

(Argued January 15, 1907; decided February 1, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 27, 1905, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of subornation of perjury.

Thomas Kelby and *James W. Ridgway* for appellant.

William Travers Jerome, District Attorney (*Robert S. Johnstone* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

CONCUR: GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ. Dissenting: CULLEN, Ch. J.

JOSEPH C. PILLMAN et al., Respondents, v. C. EDWARD
BILLQVIST et al., Appellants, Impleaded with Another.

Pillman v. Billqvist, 110 App. Div. 889, affirmed.

(Argued January 16, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 20, 1905, affirming a judgment in favor of plain-

tiffs entered upon the report of a referee in an action to recover for breach of contract.

George L. Shearer for appellants.

John Larkin and *Alexander S. Andrews* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

TIMOTHY F. PADDELL, Appellant, *v.* THE CITY OF NEW YORK,
Respondent.

Paddell v. City of New York, 114 App. Div. 911, affirmed.

(Argued January 16, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 26, 1906, affirming a judgment of Special Term sustaining a demurrer to and dismissing the complaint in an action to restrain the defendant from assessing certain real property of the plaintiff for the purposes of taxation at its full value without first deducting the amount of an indebtedness secured by mortgage on such property.

Everett V. Abbot and *Boudinot Keith* for appellant.

William B. Ellison, Corporation Counsel (*George S. Coleman* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

THE F. H. MILLS COMPANY, Appellant, *v.* THE STATE OF NEW YORK, Respondent.

Mills Co. v. State of New York, 110 App. Div. 843, affirmed.

(Argued January 16, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered Jan-

uary 16, 1906, which affirmed a judgment of the Court of Claims dismissing a claim of the plaintiff for damages arising from an alleged breach of contract entered into between the board of managers of the New York State Reformatory at Elmira and the plaintiff's assignor, for damages arising from the destruction of plaintiff's property by fire alleged to have occurred through the negligence of the agents of the state and for moneys alleged to have been overpaid to the state for the labor of prisoners.

John Cunneen for appellant.

William Schuyler Jackson, Attorney-General (Robert J. Fish of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and HISCOCK, JJ. Not sitting: CHASE, J.

RUDOLPH A. BREIDENBACH, as Trustee in Bankruptcy of GEORGE J. RAINESS, Respondent, *v.* DAVID MAYER, Appellant.

Breidenbach v. Mayer, 110 App. Div. 891, affirmed.

(Argued January 17, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to set aside an alleged transfer of property by the bankrupt herein to the defendant within four months of the filing of the petition in bankruptcy.

I. Henry Harris for appellant.

George Malraison for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOUIS GARDNER, Respondent, v. SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

People ex rel. Gardner v. Supreme Court Ind. Order of Foresters, 112 App. Div. 906, affirmed.

(Argued January 17, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 20, 1906, which affirmed a judgment of Special Term directing the issuance of a peremptory writ of mandamus to compel the defendant to reinstate the relator as a member in good standing of the Independent Order of Foresters.

John P. Kellas for appellant.

Ellsworth C. Lawrence for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of GEORGE HESS, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
SILAS L. STRIVINGS et al., Respondents.

Matter of Hess, 110 App. Div. 476, affirmed.

(Submitted January 18, 1907; decided February 1, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 3, 1906, which affirmed a decree of the Wyoming County Surrogate's Court refusing to assess a transfer tax on certain real property transferred by George Hess, deceased, prior to his death.

Frank K. Cook and *L. A. Walker* for appellant.

Irving G. Botsford for respondents.

Order affirmed, with costs, on opinion of SPRING, J., below.
CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,
VANN, WERNER and CHASE, JJ. Not sitting: HISCOCK, J.

WILLIAM J. PARKS, as Administrator of the Estate of EDWIN L. COOLIDGE, Deceased, Respondent, *v.* THE CITY OF NEW YORK, Appellant, Impleaded with Others.

Parks v. City of New York, 111 App. Div. 836, affirmed.
(Argued January 18, 1907; decided February 1, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 28, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate, alleged to have occurred through the negligence of defendants.

William B. Ellison, Corporation Counsel (*Theodore Connoly* and *Terence Farley* of counsel), for appellant.

Joseph H. Choate, Jr., and *William B. Waring* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,
VANN, WERNER, HISCOCK and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
JACOB HERMAN, Appellant.

People v. Herman, 115 App. Div. 905, appeal dismissed.
(Argued January 30, 1907; decided February 1, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

November 24, 1906, which affirmed an order of the court at a Trial Term directing the removal of the within criminal action to the Orange County Court and authorizing the trial of said action at an adjourned term thereof.

Henry Bacon and *C. L. Waring* for appellant.

Thomas C. Rogers for respondent.

Appeal dismissed; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER,
WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
WILBER F. DE PUY, Appellant.

People v. De Puy, 115 App. Div. 564, appeal dismissed.
(Argued January 30, 1907; decided February 1, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 24, 1906, which affirmed an order of the court at a Trial Term directing the removal of the within criminal action to the Orange County Court and authorizing the trial of said action at an adjourned term thereof.

Henry Bacon and *C. L. Waring* for appellant.

Thomas C. Rogers for respondent.

Appeal dismissed; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER,
WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
GAETANO GIANVECCHIO, Appellant.

People v. Gianvecchio, 118 App. Div. 903, appeal dismissed.
(Submitted January 28, 1907; decided February 1, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial

department, entered May 11, 1906, which affirmed a judgment of the Court of General Sessions in the county of New York rendered upon a verdict convicting the defendant of the crime of forgery in the second degree.

The motion was made upon the ground of failure of the appellant to prosecute the appeal.

William Travers Jerome, District Attorney (E. Crosby Kindleberger of counsel), for motion.

Rosario Maggio opposed.

Motion granted and appeal dismissed unless appellant duly notice the appeal for argument for March 4, 1907, and serve three copies of his printed brief on the district attorney on or before February 25, 1907, in which case motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WESTON J. SMITH, Appellant.

People v. Smith, 114 App. Div. 513, appeal dismissed.
(Submitted January 28, 1907; decided February 1, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed a judgment of the Court of General Sessions in the county of New York rendered upon a verdict convicting the defendant of the crime of abduction.

The motion was made on the ground of failure to prosecute the appeal.

William Travers Jerome, District Attorney (E. Crosby Kindleberger of counsel), for motion.

No one opposed.

Motion granted and appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
HARRY FARBER, Appellant.

People v. Farber, 115 App. Div. 900, appeal dismissed.
(Submitted January 28, 1907; decided February 1, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1906, which affirmed a judgment of the Court of Special Sessions in the city of New York rendered upon a verdict convicting the defendant of the crime of unlawful entry.

The motion was made upon the ground of failure to prosecute the appeal.

William Travers Jerome, District Attorney (*E. Crosby Kindleberger* of counsel), for motion.

No one opposed.

Motion granted and appeal dismissed.

ISAAC T. BROWN, Appellant, *v.* MARY C. LEARY, as Administratrix of the Estate of JAMES D. LEARY, Deceased, Respondent.

Brown v. Leary, 100 App. Div. 421, appeal dismissed.
(Submitted January 18, 1907; decided February 1, 1907.)

APPEAL from a final judgment in favor of defendant, entered February 21, 1905, by default, after failure of plaintiff to comply with the terms of an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer, with leave to amend upon payment of costs in an action to recover for the conversion of certain pledged securities.

Benjamin E. De Groot and *Samuel Campbell* for appellant.

Albert A. Wray and *Stephen Callaghan* for respondent.

Appeal dismissed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, HISCOCK and CHASE, JJ.

HUGH H. SENIOR, Appellant, *v.* NEW YORK CITY RAILWAY
COMPANY, Respondent.

Senior v. New York City Ry. Co., 111 App. Div. 39, affirmed.
(Argued December 12, 1906; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 15, 1906, affirming a judgment of the Appellate Term, which affirmed a judgment of the Municipal Court of the city of New York dismissing the complaint in an action to recover a penalty under sections 39 and 101 of the Railroad Law.

Hampton D. Ewing and *George H. Gilman* for appellant.

Adrian H. Joline, *Adrian H. Larkin* and *Henry V. Poor* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,
WERNER, HISCOCK and CHASE, JJ. Taking no part: GRAY, J.

ISAAC T. BROWN, Appellant, *v.* MARY C. LEARY, as Administra-
trix of the Estate of JAMES D. LEARY, Deceased, Respondent.

Brown v. Leary, 100 App. Div. 421, appeal dismissed.
(Argued February 18, 1907; decided February 19, 1907.)

APPEAL from a final judgment, entered February 21, 1905, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer in an action for conversion.

Benjamin E. De Groot and *Samuel Campbell* for appellant.

Albert A. Wray and *Stephen Callaghan* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,
VANN, WERNER, HISCOCK and CHASE, JJ.

CATHARINE HEDORFER, as Administratrix of the Estate of JOHN HEDORFER, Deceased, Appellant, v. JACOB RUPPERT, Respondent.

Hedorfer v. Ruppert, 104 App. Div. 631, affirmed.

(Argued January 21, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 12, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been caused by his being kicked by a vicious horse belonging to defendant.

John Frankenheimer for appellant.

George Gordon Battle and *Frederick E. Fishel* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT and CHASE, JJ.
Dissenting: EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ.

ELIZABETH CLARK et al., Appellants, v. JESSE DURLAND, Respondent.

Clark v. Durland, 104 App. Div. 615, affirmed.

(Argued January 21, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from trespassing on a certain lake, the title to a portion of which was put in issue by the answer.

J. Newton Fiero, William Vanamee and F. H. Van Houten for appellants.

M. N. Kane and John J. Beattie for respondent.

Judgment affirmed, with costs ; no opinion.

Concur: GRAY, EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ. Taking no part: CULLEN, Ch. J., and WILLARD BARTLETT, J.

JOHN M. BOWERS, as Receiver of THE MERCANTILE CREDIT GUARANTEE COMPANY OF NEW YORK, Respondent, *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Appellant.

Bowers v. Ocean Acc. & Guarantee Corpn., 110 App. Div. 691, affirmed. (Argued January 21, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 2, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover amounts claimed to be due under an alleged contract.

Laurence Arnold Tanzer for appellant.

W. H. Van Benschoten for respondent.

Judgment affirmed, with costs ; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

LILLIE LAPIEDUSE, an Infant, by ABRAHAM LAPIEDUSE, Her Guardian ad Litem, Respondent, *v.* SYRACUSE RAPID TRANSIT RAILWAY COMPANY, Appellant.

Lapeduse v. Syracuse R. Tr. Ry. Co., 112 App. Div. 904, affirmed. (Argued January 21, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 30, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

C. E. Spencer for appellant.

Theodore E. Hancock for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J.; EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ., concur on the ground that the alleged errors were so cured by the subsequent charge as to become harmless; GRAY and WILLARD BARTLETT, JJ., dissent upon the ground that it was error to leave the case with the jury upon the instruction that there was a legal presumption that the plaintiff was not *sui juris*.

MARY BAKER, Appellant, *v.* METROPOLITAN LIFE INSURANCE COMPANY, Defendant, and CHARLES BAKER et al., Respondents.

Baker v. Metropolitan Life Ins. Co., 111 App. Div. 500, affirmed.
(Argued January 22, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 16, 1906, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term in an action to recover on a policy of life insurance.

John McG. Goodale for appellant.

Leonard J. Langbein and *William J. Boyhan* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

DANIEL M. HOLLAND, Respondent, *v.* NELLIE HOLLAND et al., Defendants, and CORNELIUS HOLLAND et al., Appellants.

Holland v. Holland, 113 App. Div. 890, affirmed.
(Argued January 22, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 25, 1906, affirming a judgment in favor of plaintiff entered upon a verdict in an action under section 2653a of

the Code of Civil Procedure to have a certain paper writing theretofore admitted to probate as the will of Cornelius Holland, deceased, adjudged invalid and set aside.

Albert H. Clark and Harry T. Dayton for appellants.

F. E. Cady and Frank C. Cushing for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ. Taking no part: HISCOCK, J.

ARABELLA D. HUNTINGTON et al., as Executors of COLLIS P. HUNTINGTON, Deceased, Respondents, v. SYLVESTER H. KNEELAND et al., Appellants, Impleaded with Others.

Huntington v. Kneeland, 102 App. Div. 284, affirmed.
(Argued January 22, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 16, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action for the foreclosure of a mortgage.

William E. Kisselburg, Jr., F. Spiegelberg, Sylvester H. Kneeland and Henry L. Maxson for appellants.

John G. Milburn for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

WILLIAM WALSH, as Administrator of MARY WALSH, Deceased, Appellant, v. FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, Respondent.

Walsh v. Fonda, J. & G. R. R. Co., 114 App. Div. 272, affirmed.
(Argued January 23, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July

5, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

James W. Verbeck for appellant.

Charles S. Nisbet for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

WILLIAM CSATLOS, an Infant, by JOHN CSATLOS, His Guardian ad Litem, Appellant, *v.* METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Csatlos v. Metropolitan Street Ry. Co., 107 App. Div. 615, affirmed.
(Argued January 24, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 2, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been received through defendant's negligence.

William H. L. Edwards and *Stephen C. Baldwin* for appellant.

Charles F. Brown, *Bayard H. Ames* and *Henry A. Robinson* for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Not sitting: GRAY, J.

ANTHONY SAVAGE, an Infant, by MICHAEL SAVAGE, His Guardian ad Litem, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Savage v. Brooklyn Heights R. R. Co., 111 App. Div. 916, affirmed.
(Submitted January 24, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 10, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

I. R. Oeland and *George D. Yeomans* for appellant.

Richard A. Rendick for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

CLISTA M. MCCARTHY, as Administratrix of the Estate of EDWARD SANDELL, Deceased, Respondent, *v.* THE SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

McCarthy v. Supreme Court Ind. Order of Foresters, 118 App. Div. 892, affirmed.

(Argued January 24, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 25, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, without a jury, in an action to recover the amount of a fraternal benefit certificate of life insurance.

O. P. Stockwell for appellant.

Edmund J. Plumley for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ. Taking no part : HISCOCK, J.

HATTIE ADKINSON, Respondent, *v.* THE STATE OF NEW YORK,
Appellant.

Adkinson v. State of New York, 114 App. Div. 249, affirmed.
(Submitted January 25, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 16, 1906, which affirmed a determination of the Court of Claims awarding damages to the plaintiff for injuries to growing crops arising from the flooding of lands by water discharged from the Erie canal.

Julius M. Mayer, Attorney-General (*Willis H. Tennant* of counsel), for appellant.

James Wright for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

RACHEL GREEN, as Administratrix of the Estate of CHARLES GREEN, Deceased, Appellant, *v.* URBAN CONTRACTING AND HEATING COMPANY et al., Respondents.

Green v. Urban Contracting & Heating Co., 111 App. Div. 926, affirmed.
(Argued January 25, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 5, 1906 affirming a judgment in favor of defendant

entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

Charles Steckler and Levin L. Brown for appellant.

George Gordon Battle, Frederick E. Fishel and Charles P. Caldwell for respondents.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

ANGELO DARIENZA, as Administrator of the Estate of ANTONIO GUICCESSI, Deceased, Appellant, *v.* NEW YORK CITY RAILWAY COMPANY, Respondent.

Darianza v. New York City Ry. Co., 112 App. Div. 918, affirmed.
(Argued January 25, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 14, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

Thomas J. O'Neill for appellant.

Charles F. Brown, Bayard H. Ames, Anthony J. Ernest and James L. Quackenbush for respondent.

Judgment affirmed, with costs, no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, WILLARD BARTLETT and CHASE, JJ. Taking no part: GRAY, J.

HISCOCK, J. (dissenting). I dissent from the decision about to be made.

As plaintiff's intestate was crossing on foot one of defendant's tracks in Canal street in the city of New York he was struck by one of its cars and killed. When this action,

brought to recover damages for his death, came on for trial the same was dismissed at the close of the plaintiff's case upon the ground that the intestate as a matter of law was guilty of contributory negligence and this disposition has been affirmed by the learned Appellate Division by a divided vote.

I think that the judgment was erroneous; that the trial justice encroached upon the province of the jury and disposed of or disregarded questions of fact which should have been submitted to them. The fact that upon this appeal the brief maker has deemed it necessary to cite a multitude of authorities upon reasonably familiar questions and has devoted pages of technical computation and calculation to the attempted demonstration of contributory negligence as matter of law, does not entirely tend to persuade one that the conduct of the intestate was so conclusively and transparently beyond the realm of doubt and discussion that reasonable men might not draw differing inferences in respect thereto.

At the point of accident Canal street runs east and west. Church street bisects it upon the south, but does not strictly intersect it, Green street being practically a continuation of Church street upon the north although about fifty feet east thereof. Defendant maintains two tracks in Canal street of which the northerly one is used by west-bound cars, and it was upon this track by such a car that intestate was killed. The accident happened in the evening. There was beyond any doubt evidence which would have entitled a jury to say that intestate and two companions were at the corner of Church and Canal streets upon the southerly side of the latter, and that they started to cross to the northerly side of Canal street, intestate walking upon the crosswalk and being somewhat in advance of his companions; that the latter stopped upon the first or east-bound track while intestate went upon the west-bound track and was killed.

Three eye-witnesses spoke directly as to the conduct of the dead man in crossing the street and of the movement of the car which struck him, one of these being the motorman and the other two foreigners, one of whom at least gave his evidence through an interpreter. The evidence of the latter

two witnesses is the more favorable to plaintiff, and while it is not at all times clear, but on the other hand is more or less confused and indefinite, I believe that upon an interpretation most beneficial to plaintiff it is susceptible of the following construction :

According to the evidence of Pizzarello, when intestate started from the southerly side of Canal street the car was fifty "feet" away, and when he got between the two tracks and was about to step on the northerly one the car was about twenty "feet" away; that by a "foot" was meant a "step" or a pace thirty-six inches long. And, according to the evidence of the witness Di Gaeta, when intestate started from the sidewalk to make the crossing the car was 55 or 60 paces away, and he "looked up and down;" after he had crossed the first track and was going upon the second one the car was about sixteen or twenty paces away, and two or three "paces" were twelve or thirteen feet.

There is also plain evidence to the effect that no bell was rung; that the car was going from six to eight miles an hour; that it could be seen; that no effort was made to stop it until within a very few feet of the intestate, and that the latter's body after the accident was found upon the northerly side of the track, indicating that he had nearly completed his crossing.

Therefore, if this interpretation of the evidence is permissible, a jury would have been entitled to find that when the intestate started to cross the street the car was distant upwards of 150 feet and going at a speed not to exceed eight miles an hour, and that as he started to go upon the track in question the car was still distant more than sixty feet. Intestate, for the sake of the argument at least, may be charged with knowledge of the location of the car and of the speed at which it was going, because he undoubtedly did see it or could have seen it.

Under these circumstances I do not think that it can be said as a matter of law that the intestate was guilty of negligence in attempting to make the crossing, and that defendant was free from negligence in the collision which occurred. The physical situation presented what was practically a street

intersection, for Church and Green streets together constituted what was substantially the crossing of Canal street by one street, and the crosswalk laid upon the continuation of Church street across Canal street emphasizes this fact.

It seems unnecessary to review at length the very familiar principles of law applicable to such a situation as this. The defendant and the intestate had equal rights and were subject to mutual obligations of care. The latter was not bound to postpone his attempted crossing until no car was in sight, but was entitled to proceed upon his way, provided he had a reasonable time and opportunity in which to effect his safe passage, and the former was bound so to control its cars as to avoid collisions. A question was fairly presented for the consideration of the jury whether the parties observed the obligations cast upon them respectively.

Of course there is evidence which modifies, and even contradicts, that adverted to, but it is unnecessary to spend time in stating that these variations and contradictions were for the consideration of the jury.

The case upon the evidence as it stood should have been submitted to the jury within the principles adopted in the following cases: *McDermott v. Brooklyn Heights R. R. Co.* (85 N. Y. Supp. 808); *Legare v. Union Ry. Co.* (61 App. Div. 202); *Lawson v. Metr. St. Ry. Co.* (40 App. Div. 307).

The judgment should be reversed and a new trial granted.

EDWARD J. BARTLETT, J., concurs.

GEORGE W. VOORHEES, as Administrator of the Estate of SCHUYLER H. VOORHEES, Deceased, Appellant, v. HUDSON RIVER TELEPHONE COMPANY, Respondent.

Voorhees v. Hudson River Telephone Co. 114 App. Div. 909, affirmed.
(Argued January 28, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 8, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term

in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

George B. Wellington and *Jarvis P. O'Brien* for appellant.

Lewis E. Griffith for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.

ANNA FREEMONT, as Administratrix of the Estate of JOSEPH FREEMONT, Deceased, Respondent, v. BOSTON AND MAINE RAILROAD et al., Appellants.

Freemont v. Boston & Maine R. R. Co., 111 App. Div. 831, affirmed.
(Argued January 28, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 12, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendants' negligence.

Lewis E. Carr and *Jarvis P. O'Brien* for appellants.

George B. Wellington for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

ROSE FISH, an Infant, by JOHN FISH, Her Guardian ad Litem, Respondent, v. UTICA STEAM AND MOHAWK VALLEY COTTON MILLS, Appellant.

Fish v. Utica Steam & Mohawk Valley Cotton Mills, 115 App. Div. 894, affirmed.

(Argued January 29, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

October 5, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Frederick G. Fincke for appellant.

P. H. Fitzgerald and *John F. Gaffney* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
SAMUEL KOLLER, Appellant.

People v. Koller, 116 App. Div. 173, affirmed.

(Argued January 30, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 7, 1906, affirming a judgment of the Court of General Sessions in the city of New York rendered upon a verdict convicting the defendant of the crime of grand larceny in the second degree.

Isaac N. Jacobson for appellant.

William Travers Jerome, District Attorney (*Robert S. Johnstone* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

MARY L. WITMER, as Administratrix of the Estate of LOREN T. WITMER, Deceased, Respondent, v. BUFFALO AND NIAGARA FALLS ELECTRIC LIGHT AND POWER COMPANY, Appellant.

Witmer v. Buffalo & N. F. El. L. & Power Co., 112 App. Div. 698, affirmed.

(Argued January 31, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

May 7, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

Maurice C. Spratt for appellant.

Fred M. Ackerson for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Taking no part: HAIGHT, J.

MARY McBRIDE, as Administratrix of the Estate of PATRICK McBRIDE, Deceased, Respondent, *v.* THE NEW YORK TUNNEL COMPANY, Appellant.

McBride v. New York Tunnel Co., 113 App. Div. 821, affirmed.
(Argued January 31, 1907; decided February 19, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 19, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

Perry D. Trafford and *Hoffman Miller* for appellant.

A. C. Brown for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of Proving the Will of CHESTER MOORE,
Deceased.

CAROLINE D. MOORE, Respondent; LULU L. BERGTOLD et al.,
Appellants.

Matter of Moore, 109 App. Div. 762, affirmed.
(Argued January 31, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

December 6, 1905, which reversed a decree of the Erie County Surrogate's Court admitting to probate a paper propounded as the will of Chester Moore, deceased, and granted a new trial.

Simon Fleischmann and *William R. Pooley* for appellants.

Edward R. Bosley and *Norris Morey* for respondent.

Order affirmed and judgment absolute ordered against appellants rejecting the will on the stipulation, with costs in all courts, on opinion of SPRING, J., below.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

JAMES F. BROOKS, as Administrator of the Estate of SARAH A. BROOKS, Deceased, Respondent, *v.* THE INTERNATIONAL RAILWAY COMPANY, Appellant.

Brooks v. International Ry. Co., 112 App. Div. 553, affirmed.
(Argued February 1, 1907; decided February 19, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 2, 1906, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

Porter Norton for appellant.

Eugene M. Bartlett for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Not voting: HAIGHT, J.

WILLIAM SKINNER, Respondent, v. LE ROY HYDRAULIC ELECTRIC GAS COMPANY, Appellant.

Skinner v. Le Roy Hydraulic El. Gas Co., 115 App. Div. 895, appeal dismissed.

(Argued February 18, 1907; decided February 26, 1907.)

MOTION for leave to withdraw an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 10, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to review the questions involved.

Edward Harris, Jr., for motion.

George D. Reed opposed.

Motion denied and appeal dismissed, with costs, and ten dollars costs of motion.

HANNAH K. GIBBONS, Appellant, v. PHILIP BEROLZHEIMER, Respondent.

Reported below, 103 App. Div. 609.

(Argued February 18, 1907; decided February 26, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to redeem certain shares of stock or to recover for the value thereof.

The motion was made upon the ground that the appeal had not been perfected by filing the required undertaking.

M. E. Harby for motion.

Ralph Stout opposed.

Motion denied, with ten dollars costs.

DAVID DAVIDSON, Respondent, v. CANNABIS MANUFACTURING
COMPANY, Appellant.

Davidson v. Cannabis Manuf. Co., 118 App. Div. 664, appeal dismissed.
(Submitted February 18, 1907; decided February 26, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 21, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract for the sale of real property.

The motion was made upon the ground that by reason of the unanimous affirmance by the Appellate Division no question was presented which the Court of Appeals had jurisdiction to review.

Benjamin F. Feiner for motion.

Hector M. Hitchings opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

IN the Matter of the Petition of TRUSTEES OF THE UNIVERSITY
MAGAZINE COMPANY for a Voluntary Dissolution.

RUFORD FRANKLIN, as Receiver, Appellant; AMERICAN SURETY
COMPANY, Respondent.

Reported below, 83 App. Div. 641.

(Argued February 18, 1907; decided February 26, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court, entered May 8, 1903, which reversed an order of Special Term denying a motion for an order directing the receiver to pay a certain sum of money to the respondent herein and granted such motion.

The motion was made upon the ground that the undertaking was not served within the required time.

Rutherford Towner for motion.

McDougall Hawkes opposed.

Motion denied.

FRANKLIN HAINES, Appellant, v. AMZI L. BARBER et al.,
Respondents.

Haines v. Barber, 113 App. Div. 696, appeal dismissed.
(Argued February 18, 1907; decided February 26, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 17, 1906, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial in an action to restrain the forfeiture of the plaintiff's rights under a certain agreement and to set aside a sale of certain stock thereunder.

The motion was made upon the ground that the judgment of Special Term was unanimously reversed upon the facts as well as upon the law.

Louis L. Babcock for motion.

Abraham Benedict opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

OSCAR MEIROWITZ et al., Composing the Firm of MEIROWITZ & WEBER, Respondents, v. HOME INSURANCE COMPANY, Appellant.

Reported below, 116 App. Div. 918.
(Argued February 18, 1907; decided February 26, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 12, 1906, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover upon policies of fire insurance.

The motion was made upon the ground that no substantial question of law was involved.

Walter M. Rosebault for motion.

Alfred B. Nathan opposed.

Motion denied.

TRUST COMPANY OF AMERICA, as Committee of ALPHONSE J. STEPHANI, Respondent, v. THE STATE SAFE DEPOSIT COMPANY, Appellant.

(Submitted February 18, 1907; decided February 26, 1907.)

Motion for re-argument denied, with ten dollars costs.
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APPEAL.

1. *When Certification Not Required Upon Appeal From Unanimous Decision* — Code Civ. Pro. § 191, Subd. 2. Under the statute (Code Civ. Pro. § 191, subd. 2), an action brought to recover for services rendered is appealable to the Court of Appeals from a unanimous affirmance of a judgment by the Appellate Division, with the permission of the latter court without any question of law being certified. *Fisher Co. v. Woods*. 90

2. *Exceptions to Conclusions of Law*. A contention that the appellant in such action has no standing in the Court of Appeals to review such judgment, for the reasons that the exceptions taken by the appellant are to the conclusions of law which were proposed by itself and found by the trial court in conformity with the appellant's own requests, is untenable where the record fails to show that the conclusions of law were proposed by the appellant or that the trial court found in conformity with its requests. *Id.*

3. *Questions of Law in Criminal Cases Raised Only by Exceptions*. The fact that the Appellate Division certifies that a judgment of a County Court convicting the defendant of the crime of assault in the first degree, under an indictment for manslaughter in the first degree, was reversed "upon questions of law only," for the reason indicated in its opinion that the facts did not constitute the crime for which a conviction was had, does not enable the Court of Appeals to pass upon the question, in the absence of any exception taken upon the trial raising it; no court can create an error of law by certifying that there is one, and a question of

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law in a criminal case can be raised only by an exception; the Appellate Division itself had no power to pass upon the question and its order must be reversed and the judgment of conviction affirmed. *People v. Huson*. 97

4. *Judgment of Appellate Division Rendered in Criminal Action Originating in Court of Special Sessions Not Reviewable.* The Court of Appeals has no jurisdiction to hear an appeal from a judgment rendered by the Appellate Division affirming a judgment of a County Court modifying and affirming a judgment of a Court of Special Sessions convicting the defendant of the crime of petit larceny. (Code Crim. Pro. §§ 699-772.) *People v. Johnston*. 319

5. *When Certified Question Cannot Be Answered.* The Court of Appeals cannot answer a question certified to it by the Appellate Division upon an appeal from a judgment of that court affirming a judgment of a County Court, which affirmed a judgment of a City Court, in the absence of a provision for the certification of questions upon the allowance of an appeal of such a character. *Swan v. Inderlied*. 372

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ASSIGNMENT.

Assignment of Interest in Trust Estate — When Notice Thereof Is Sufficient to Charge Trustees with Knowledge of the Facts and Render It Liable for Payment to Beneficiary. Upon the trial of an action against a trust company to recover a legacy assigned to plaintiff's intestate, it appeared that the defendant had been appointed as a substituted trustee under a will creating a trust fund of which the assignor was one of the beneficiaries and had received notice of the assignment; that it requested its submission to its counsel in order that it might be determined whether it covered any fund in its possession; that no attention was paid to such request; that at the time it received the notice the defendant had in its possession a decree disclosing that the assignor was one of the beneficiaries of the trust fund, and the assignee was one of the executors and trustees of the will, who had renounced; that the assignor was one of the children of a deceased son of the testatrix; that her interest was assign-

ASSIGNMENT — Continued.

able; that it was duly assigned as stated in the notice; that the assignment was drawn by such executor; that after its execution it remained in his possession when the defendant was appointed trustee and received notice thereof; that notwithstanding these facts, upon the termination of the trust, it procured a judicial settlement of its accounts without notice to plaintiff, and thereupon paid the several beneficiaries their respective legacies, including the assignor's. *Held*, that although some of the facts were not known to the defendant at the time of the judicial settlement, enough were known to put it on inquiry which, if prosecuted diligently, would have disclosed all the facts, and that in making the payment to the assignor it acted at its peril and plaintiff was entitled to recover. *Seger v. Farmers' L. & T. Co.* 314

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Lien for Services in Procuring Payment to Beneficiary of Income of Trust Fund Established for His Support and Education—Code Civ. Pro. § 66. The income from a trust fund directed to be paid over to the beneficiary for the support and education of the beneficiary and his family, although exempt from the claims of general creditors so far as it is required for his support, is not exempt from a claim for necessary services rendered by an attorney employed by him to compel a trustee refusing to do so, to pay over the income necessary for his support, and who, for that purpose, has instituted proceedings in a Surrogate's Court; under section 66 of the Code of Civil Procedure such attorney has a lien for the reasonable value of his services in procuring the amount of income withheld, but not for services rendered in and about the estate for other relief. *Matter of Williams.* 286

BAILMENT.

When Shopkeeper Not Liable for Loss Occurring Through Negligence of Customer. In an action to recover for the loss of articles stolen from a retail clothing store, it appeared that the plaintiff went to a clerk engaged with another customer and was directed to go to a designated table and wait upon himself, which he did; for the purpose of trying on the garments he desired to purchase, he laid aside, on an adjoining table, his coat and vest containing his watch, chain and cigar cutter; no other clerk was in the immediate vicinity to watch the clothing; a number of persons were in the store examining goods, passing and repassing; while plaintiff was engaged in trying on garments the vest and its contents were stolen. *Held*, that the loss occurred through his own negligence, and a recovery could not be sustained. *Wamser v. Browning, King & Co.* 87

BANKING.

1. *Rights of Bank in Commercial Paper Sent to It for Collection.* When a draft is delivered to the payee for collection only, which in turn remits it to its correspondent bank for collection, the latter acquires no better title to it or its proceeds than the payee, unless it becomes a *bona fide* purchaser of it for value or makes advances upon it in good faith without notice of any defect in title, and the mere existence of an indebtedness of the payee to the bank does not constitute it a holder for value. *Bank of America v. Wuydell.* 115

2. *Restrictive Indorsement.* An indorsement in blank accompanied by a letter stating that the enclosed draft was for "collection and credit" must be read together, and the effect is to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement. *Id.*

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Common Carriers — Action for Assault upon Passenger by Employees of Street Railway Company — When Allegations of Complaint Therein Constitute Cause of Action for Breach of Defendant's Contract to Carry Passenger Safely. Where it is alleged, in an action brought against a street railway company, that the plaintiff became a passenger of the defendant for the purpose of being carried upon one of its cars; that, in consideration of the required fare duly paid by the plaintiff, the defendant agreed to carry him safely and treat him properly, and that, in violation of such contract, the defendant, through its agents and employees, wrongfully and illegally maltreated and assaulted the plaintiff, the complaint states facts which constitute a cause of action for a breach of a contract between the defendant and the plaintiff, and not a cause of action for a tort, and it is no bar or answer to such cause of action that an action for tort might have been, and ordinarily would be, brought for the acts of which the plaintiff complained; the Municipal Court of the city of New York has, therefore, jurisdiction of the action; and where a judgment for plaintiff, entered upon the verdict of a jury, has been unanimously affirmed by the Appellate Division, it must be assumed that there was evidence to support the verdict, and, in the absence of some objection thereto, it also may be presumed that such evidence was in accordance with, and in support of, the allegations of the complaint. *Busch v. Interborough R. Tr. Co.* 383

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CODE OF CIVIL PROCEDURE.

1. § 68 — *Attorney and Client — Lien for Services in Procuring Payment to Beneficiary of Income of Trust Fund Established for His Support and Education.* The income from a trust fund directed to be paid over to the beneficiary for the support and education of the beneficiary and his family, although exempt from the claims of general creditors so far as it is required for his support, is not exempt from a claim for necessary services rendered by an attorney employed by him to compel a trustee refusing to do so, to pay over the income necessary for his support, and who, for that purpose, has instituted proceedings in a Surrogate's Court; under section 68 of the Code of Civil Procedure such attorney has a lien for the reasonable value of his services in procuring the amount of income withheld, but not for services rendered in and about the estate for other relief.
Matter of Williams. 286

2. § 191 — *Appeal — When Certification Not Required upon Appeal from Unanimous Decision.* Under the statute (Code Civ. Pro. § 191, subd. 2), an action brought to recover for services rendered is appealable to the Court of Appeals from a unanimous affirmance of a judgment by the Appellate Division, with the permission of the latter court without any question of law being certified. *Fisher Co. v. Woods.* 90

3. § 263 — *Court of Claims — Practice — Negligence — Failure to Move for Nonsuit at Close of Evidence Precludes Review of Questions of Law.* Under the provisions of the Code of Civil Procedure relating to the Court of Claims (§ 263 et seq.) there is no reason why the practice therein should not be measured or judged by the same rules as prevail in the Supreme Court. Where, therefore, upon the trial, in the Court of Claims, of a claim against the state for injuries alleged to have been sustained by an employee thereof by reason of the negligence of a canal brigdetender, the counsel for the state failed to renew, at the close of all the evidence, a motion for a nonsuit, which was made and denied at the end of the evidence for the claimant, such failure will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the claim and case dismissed as a matter of law; so that a contention that the brigdetender, at the time he injured the claimant, was not acting within the scope of his employment so as to render the state liable for his misconduct and that, therefore, the claimant should have been nonsuited upon the trial, cannot be considered upon an appeal from a judgment of the Appellate Division affirming a judgment, granted by

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the Court of Claims, against the state and in favor of the claimant.
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4. § 723 — *Amendment — Changing Designation of Defendant from Representative to Individual Capacity Does Not Effect a Change of Parties — Statute of Limitations* The Supreme Court has power, under section 723 of the Code of Civil Procedure, to permit the amendment of the summons and complaint in an action of negligence by changing the designation of the defendant from trustee to that of an individual. The effect of the amendment is not tantamount to bringing in a new party, so as to enable it to plead the Statute of Limitations as a bar to its liability, more than three years having elapsed between the time of the accident and the date of the service of the amended summons and complaint, but merely changes the capacity in which the defendant is sought to be charged.
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5. § 829 — *Evidence — Personal Transactions with Decedent.* The object of the enactment of the limitation of section 829 of the Code of Civil Procedure, relating to the examination of a party, etc., was to so carefully balance rights that the survivor should not take advantage of a deceased person, and the personal representatives should not take advantage of a survivor. The party for whose protection the limitation was made may keep the door closed if he chooses, but if he opens it at all, he opens it wide as to any transaction concerning which he examines the survivors.
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6. *Item — Action to Recover Moneys Alleged to Have Been Obtained from Decedent by Fraud — When Defendant May Testify as to Personal Transactions.* Where, in proceedings to settle executor's accounts, a residuary legatee claiming that the executor had failed to recover moneys obtained by a party from the testatrix by undue influence and fraud, partially examines such party as to personal transactions with the deceased, and it being concluded that the surrogate had no jurisdiction the proceedings are suspended and such legatee induces the executor as nominal plaintiff to bring an action to recover the amount, and in such action he introduces in evidence the statements of defendant made in the proceeding before the surrogate, he thereby waives his privilege under section 829 of the Code of Civil Procedure, and the defendant is entitled to testify as to the whole of any transactions about which she was examined in the proceeding; since if the representative of decedent speaks himself or compels the survivor to tell a part, he waives the right to object to his telling the rest. *Id.*

7. § 880 — *Testimony of Deceased Witness Read on New Trial.* The evidence of a deceased witness given on the trial of an action brought against an elevated railroad company for damages to abutting property may be read on a new trial of the action against a lessee brought in as defendant. It is unnecessary to determine whether section 880 of the Code of Civil Procedure, as amended by chapter 852 of the Laws of 1899, limiting such evidence to a new trial between the same parties or "their legal representatives," would permit the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stands in the absence of an express or necessarily implied repeal. *Shaw v. N. Y. El. R. R. Co.* 186

8. §§ 2015-2019 — *Crimes — One Arrested on a Criminal Charge by Information Entitled to Writ of Habeas Corpus Before Examination — Warrant Is a Nullity in the Absence of Any Evidence to Sustain It.* One arrested under a warrant issued by a magistrate charging him with a crime is not obliged to await an examination, but may at once resort for his protection to the writ of habeas corpus. (Code Civ. Pro. §§ 2015-2019; Code Crim. Pro. §§ 188-197.) The court upon such a proceed-

CODE OF CIVIL PROCEDURE — Continued.

ing will look back of the warrant and see if the facts stated in the depositions of the prosecutor and his witnesses conferred jurisdiction upon the magistrate to issue it (Code Crim. Pro. § 149); and unless there is some evidence to sustain it, the warrant is a nullity and the defendant is entitled to his discharge. *People ex rel. Perkins v. Moss.* 410

9. § 2323a — *Insane — Appointment of Committee for Insane Life Convict.* Under the provisions of chapter 401 of the Laws of 1889 the Supreme Court has jurisdiction, upon the application of the persons mentioned therein, to entertain proceedings and direct the appointment of a committee of the estate of a life convict, although the convict before the commencement of the proceedings had become insane and had been transferred to a state hospital for insane convicts; the statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced, whether the convict should thereafter become insane or not and was not repealed by the enactment in 1895 of section 2323a of the Code of Civil Procedure, providing for the appointment of a committee upon the application of a state officer having special jurisdiction over the institution or by the superintendent thereof, "where an incompetent person has been committed to a state institution in any manner provided by law and is an inmate thereof." *Trust Co. of America v. State Safe Deposit Co.* 178

10. § 3357 — *Condemnation Proceedings — Objection by Property Owner.* While there is no specific provision in the Condemnation Law (Code Civ. Pro. § 3357 *et seq.*) for questioning the sufficiency of a petition in condemnation proceedings by objection on the part of the property owner, such method of procedure has been sanctioned by the courts for many years. *Beil Telephone Co. v. Parker.* 299

11. § 3360 — *Telephone Line — Proceeding to Acquire Right to Trim Trees in Order to Protect Line from Interference — When Petition Insufficient.* Where a petition in condemnation proceedings, instituted to acquire title to certain property, describes the property to be taken as "an easement or right of way for the erection, maintenance and operation of a line of telephone, said line to consist of " a designated number of poles, to be set at designated places, with the right to attach the necessary wires or cables thereto, " and with the right to trim such trees as may be necessary to protect said line from interference," the petition is insufficient because it fails to describe the property, rights and easements sought to be acquired with sufficient particularity to be a compliance with the provisions of the Condemnation Law (Code Civ. Pro. § 3360, sub. 2), in that it is not sufficiently specific in stating the extent of the right which the petitioner desires to acquire "to trim such trees as may be necessary to protect said line from interference;" since the precise distance to which such trees must be trimmed to maintain the safety of the line should be stated in the petition in order that the property owner may be informed in advance as to the extent of the interest which the condemning party seeks to acquire, and in order that the commissioners may be similarly guided in measuring their award. *Id.*

CODE OF CRIMINAL PROCEDURE.

1. §§ 149, 188-197 — *Crimes — One Arrested on a Criminal Charge by Information Entitled to Writ of Habeas Corpus Before Examination — Warrant Is a Nullity in the Absence of Any Evidence to Sustain It.* One arrested under a warrant issued by a magistrate charging him with a crime is not obliged to await an examination, but may at once resort for his protection to the writ of habeas corpus. (Code Civ. Pro. §§ 2015-2018; Code Crim. Pro. §§ 188-197.) The court upon such a proceeding will look back of the warrant and see if the facts stated in the depositions of the prosecutor and his witnesses conferred jurisdiction upon the magistrates to issue it (Code Crim. Pro. § 149); and unless there is some evi-

CODE OF CRIMINAL PROCEDURE — Continued.

dence to sustain it, the warrant is a nullity and the defendant is entitled to his discharge. *People ex rel. Perkins v. Moss.* 410

2. § 813 — *Indictment — When Denial of Motion to Dismiss Not Erroneous — Legality and Sufficiency of Evidence upon Which Indictment Is Found.* A motion to dismiss an indictment may be made in any case where it is claimed that the legal evidence received by a grand jury is insufficient to support an indictment, or that illegal evidence is the sole basis therefor, for this is a constitutional right notwithstanding the provisions of section 813 of the Code of Criminal Procedure to the contrary; and the right to make such a motion implies the right to have an adverse decision reviewed by the Court of Appeals upon an appeal from a judgment of conviction in a capital case; but where the moving affidavits are vague and unsatisfactory and the court's attention is directed to no illegal evidence that was presented to the grand jury, and the general charge that the evidence was insufficient is supported by no direct or definite statements, a denial of the motion upon the grounds that the evidence was sufficient to sustain the indictment, and that none of the evidence was illegal, will be sustained. *People v. Sexton.* 495

3. § 892 — *Reception, by Grand Jury, of the Unsworn Testimony of Infants under Twelve Years of Age — When Examination as to Intelligence of Such Witnesses by Grand Jury Is Sufficient Compliance with Law.* The fact that two of the witnesses, who were examined before the grand jury, were children under the age of twelve years, although they were neither sworn nor examined as to their intelligence, pursuant to the statute (Code Crim. Pro. § 892), by the justice who presided at the term during which the defendant was indicted, does not affect the validity of the indictment, where the justice, before whom a motion to dismiss was made, and who examined the minutes of the grand jury decided that there was sufficient other evidence to sustain the indictment; but where it appears from the affidavit of the district attorney, upon the motion to dismiss the indictment, that the statute was literally complied with in the examination of the children before and by the grand jury, such examination is a sufficient compliance with the statute, since a grand jury, although a part of the court with which it is convened, is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules; and, as the statute (Code Crim. Pro. § 892) authorizing the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen, the grand jury has the power to determine for itself the qualifications of such witnesses so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances. *Id.*

4. §§ 699-772 — *Appeal — Judgment of Appellate Division Rendered in Criminal Action Originating in Court of Special Sessions Not Reviewable.* The Court of Appeals has no jurisdiction to hear an appeal from a judgment rendered by the Appellate Division affirming a judgment of a County Court modifying and affirming a judgment of a Court of Special Sessions convicting the defendant of the crime of petit larceny. (Code Crim. Pro. §§ 699-772.) *People v. Johnston.* 819

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Objection, by property owner — property or interest to be condemned must be accurately described in petition — proceeding to acquire right to trim trees in order to protect telephone lines.

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To construction of elevated railroad — when no bar to action for damages by subsequent grantees without notice.

See RAILROADS, 5, 7.

CONSTITUTIONAL LAW.

1. *Stock Transfer Tax Act (L. 1906, Ch. 414, § 1) Invalid as an Arbitrary Discrimination in Favor of One as Against Another of the Same Class.* Section 1 of chapter 414 of the Laws of 1906, which purported to amend the Stock Transfer Tax Act (section 315 of the Tax Law, as amended by chapter 241 of the Laws of 1905), and imposes a tax of two cents "on each share of one hundred dollars of face value or fraction thereof," instead of "on each hundred dollars of face value or fraction thereof," as provided by the act of 1905, taxes the sale of all shares of the face value of one hundred dollars and also all shares of the face value of any fraction of one hundred dollars; the tax is measured by the number of shares regardless of face value, instead of by the face value of the shares sold, *i. e.*, the sale of one hundred shares of the face value of ten dollars is taxed two dollars, while the sale of ten shares of the face value of one hundred dollars is taxed twenty cents, the shares sold in each case being worth the same amount. All corporate shares are placed in a class, but all members of the class are not treated alike; without method or order or reason the statute bears heavily upon some and lightly upon others in the same situation. This is not classification but arbitrary or accidental selection. While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. The taxing clause of the act of 1906 must be regarded as an arbitrary discrimination in favor of one as against another of the same class, is a violation of primary rights and as such it is unconstitutional and void. *People ex rel. Farrington v. Minsching.* 8

2. *Stock Transfer Tax Act (Tax Law, § 315; Amd. by L. 1905, Ch. 241) Not Affected by Unconstitutionality of Act of 1906.* A contention that although the amendment is void, it may be regarded as valid for the purpose of substitution or repeal cannot be sustained. A valid statute cannot be annulled by a void amendment. A statute is never repealed by implication when a provision of a later act which would otherwise effect a repeal is unconstitutional and void. The taxing clause of the act of 1906 being unconstitutional, the taxing clause of the act of 1905, which it purported to amend, was not repealed, modified or in any way affected. *Id.*

3. *Validity of Warrant of Arrest Charging Violation of Statute.* A warrant of arrest charging the relator in habeas corpus proceedings with his failure to affix any stamp or pay any tax upon a sale of stock certificates by him, "in violation of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906," is valid, although it recites the void statute, where the relator attacks the latter as void, and he is presumed to have known that, if void, the former statute must be operative, and hence he could not be misled. Especially is this true in this case, since the act of 1906 was not altogether void. Section 2 thereof amended section 317 of the act of 1905, relating to the penalty for a failure to pay the tax, and the warrant does not refer to the section violated, but to that part of the act which was valid. *Id.*

4. *Penal Code, Section 640d — Unconstitutional under Federal and State Constitutions (U. S. Const. Art. 1, § 10 and 14th Amendment; N. Y. State Const. Art. 1, §§ 1 and 6).* Section 640d of the Penal Code (L. 1901, ch. 128), which provides that "in cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, * * * shall be guilty of a misdemeanor," is an improper and unreasonable exercise of the police powers of the state, vested in the legislature, and violative of the Federal and State Constitutions (U. S. Const. art. 1, § 10, and 14th amendment; N. Y. State Const. art. 1, §§ 1 and 6), in that it is an arbitrary infringement upon the liberty and rights of all persons who engage in selling real estate for others, with or without compensation, by making the person employed

CONSTITUTIONAL LAW—Continued.

and acting without written authority guilty of a misdemeanor and punishable as a criminal. *Fisher Co. v. Woods.* 90

Requirement in charter of city of Middletown as to written notice of existence of snow and ice on sidewalk, constitutional.

See MUNICIPAL CORPORATIONS, 1, 2.

Chapter 122 of Laws of 1898 authorizing establishment of College of Forestry by Cornell University not violative of forest preserve section of Constitution or constitutional prohibition against giving or loaning money or credit of the state.

See STATE, 1-3.

CONTINUANCE.

Proceeding against an officer of a municipality for enforcement of a right, not abated by resignation or removal of officer.

See MANDAMUS, 1, 2.

CONTRACT.

See *McWhirter v. Bowen* (Mem.), 516; *Dubroff v. Curtis Bros. Lumber Co.* (Mem.), 517; *Falcoy v. Woolner* (Mem.), 518; *Clements v. Sherwood-Dunn* (Mem.), 521; *Williams v. Gridley* (Mem.), 526; *Cassidy v. Sauer* (Mem.), 540; *Baker v. Appleton & Co.* (Mem.), 548; *Pillman v. Billqvist* (Mem.), 551; *F. H. Mills Co. v. State of N. Y.* (Mem.), 552; *Bowers v. Ocean Accident & Guarantee Co.* (Mem.), 587.

Of street railway to carry passenger safely — when assault by employee constitutes breach thereof.

See CARRIERS.

Of sale, title to remain in vendor until payment — rights of vendor.

See MORTGAGE, 1, 2.

Of conditional sale — effect of section 116 of Lien Law upon.

See SALE, 1, 2.

CONVERSION.

Common Carrier—When Railroad Company Sued for Conversion of Goods Delivered to It for Transportation May Set Up Its Ownership of the Goods as a Defense. In an action against a common carrier to recover damages for the conversion of certain rails shipped over its lines, in which the defendant pleaded title to the rails and secured a verdict, assuming that the question of the availability of such a defense was raised on the trial, and that the Appellate Division had the right to consider it and reverse upon the ground that it was not available, the decision of that court must be regarded as erroneous where the defendant received the property for transportation in good faith, without knowledge that the rails were its property, and thereafter discovered that they belonged to it; and, therefore, there is no reason why it should not avail itself of such defense with the same force and effect that it could avail itself of the right of a true owner in case of a third person. *Valentine v. L. I. R. R. Co.* 121

See *McNeil v. Hall* (Mem.), 549; *Brown v. Leary* (Mem.), 558; *Brown v. Leary* (Mem.), 559.

Of property sold under contract of conditional sale.

See SALE, 1, 2.

Equitable conversion of fund into real property.

See WILL.

CONVICTS.

Appointment of committee for insane life convict—when cannot be attacked collaterally.

See INCOMPETENT PERSONS, 1, 2.

CORPORATIONS.

1. *Agreement Between Two Railroad Corporations Compromising Dispute as to Which Was Entitled to Saving in Interest Arising from Refunding Operations.* In an action brought by minority stockholders of the New York and Harlem Railroad Company (the company upon request having declined to bring it) to have declared null and void a compromise agreement made with the New York Central Railroad Company with respect to a division of the amount of interest saved by the refunding of the bonded indebtedness of the Harlem Company at a lower rate of interest, both parties having claimed to be entitled to the whole amount, it appeared that the dispute between the companies arose over the construction of the terms of a lease of the Harlem railroad to the Central Company; eminent counsel differed in their construction; a suit had been instituted by the Central Company and also by a stockholder of the Harlem Company to determine the questions involved; under these circumstances an amicable adjustment of the controversy was deemed advisable, and the directors of each of the contracting parties, a majority of whom were directors of both companies, entered into the agreement in question, substantially dividing the amount saved in interest between the two companies; the agreement was thereafter ratified by the stockholders of both companies; notwithstanding the ratification the agreement was not executed by the Harlem Company until the Central Company upon demand had indemnified the former for its action; thereafter the Central Company discontinued its suit and secured a discontinuance of the stockholders' suit by transferring certain stock to the plaintiff therein; it was affirmatively found that the dispute between the two companies was an honest one and was in good faith compromised and "that there was no combination, conspiracy, and no fraud." *Held*, that although by the terms of the original lease the Harlem Company was entitled, if it could procure the necessary funds, to pay off the bonds and secure to itself any advantage in the reduction of interest arising from a new loan, that nevertheless the compromise agreement was binding on both parties thereto and concluded the rights of the plaintiffs. *Continental Ins. Co. v. N. Y. & H. R. R. Co.* 225

2. *Compromise Agreement Voidable, Not Void.* Assuming that the fact that the majority of the directors of the Harlem Company were directors of the Central Company rendered the agreement voidable at the election of the Harlem stockholders, it was not absolutely void, and having been ratified by them, became binding upon the company. *Id.*

3. *When Minority Stockholders Not Entitled to Maintain Action.* The right to avoid the agreement, however, rested in the Harlem Company, not in minority stockholders, unless the ratification thereof was dictated by fraud or was procured by concealment and in ignorance of the true state of the facts, which it was affirmatively found was not the case here. *Id.*

4. *Appeal—Stipulation as to Evidentiary Facts Does Not Enable Court of Appeals to Consider Findings Unanimously Affirmed.* Whatever may be the force of a contention that the existence of issuable or traversable facts having been stipulated by the parties on the trial, the Court of Appeals is bound to accept and consider them, notwithstanding the findings have been unanimously affirmed by the Appellate Division, it is not applicable to merely evidentiary facts, not necessary to allege or plead, but constituting only evidence from which the issuable or traversable facts can be determined, especially in a case where all the stipulated

CORPORATIONS — Continued.

facts fail to establish fraud or misconduct on the part either of the directors or of the majority of stockholders. *Id.*

5. *Action of Common Directors of the Two Corporations.* That the common directors of the two corporations asserted the rights of each, as the occasion required, is not a proper ground for criticism, that being the right thing to do. *Id.*

6. *When Circular Alleged to Have Been Misleading Cannot Affect Result.* A contention that a circular issued to stockholders calling the meeting to act on the proposed compromise agreement was misleading and insufficient is without force when not a single stockholder voting for the ratification has complained that he was misled or has sought to repudiate his action, where the controversy was of long duration and some public discussion and the plaintiffs at all times knew the exact situation. *Id.*

7. *Settlement of Litigation Does Not Establish Fraud.* A settlement by the Central Company of the Harlem stockholders' suit and the exaction of indemnity by the Harlem Company, while showing that both companies were fearful of litigation, does not establish fraud. *Id.*

8. *Sufficiency of Vote Ratifying Agreement.* Assuming that the compromise agreement was in effect a new lease to be executed with the same formalities and vote as in the case of the original lease, under chapter 433 of the Laws of 1893, the vote of the Central Company's stockholders was sufficient, two-thirds of the stock voted upon at the meeting being cast in favor of the lease. *Id.*

9. *Interest upon Claims of Creditors of Insolvent Trust Company — Contract Rate Before, Legal Rate After the Appointment of Receiver.* In an action brought by the attorney-general to wind up the affairs of an insolvent trust company, interest should be allowed to creditors having special interest contracts with the company at the contract rate to the date the receiver takes possession of its assets; thereafter interest is allowable against the company, if the assets are sufficient after payment of the principal of the indebtedness, as established at the time the receiver took possession, and should be paid at the legal rate before the distribution of the surplus to stockholders. *People v. Merchants' Trust Co.* 293

10. *Liability of Business Corporation for Expense of Publishing Notices of Special Election of Stockholders and Calls for Proxies to Be Voted Thereat, under Attempted Authorization of Majority of Directors.* Where it appears, in an action brought against a corporation by an advertising company to recover for services and expenses in procuring the publication of four notices relating to a special meeting of the stockholders and to the obtaining of proxies to be voted upon questions in dispute between the president and the majority of the board of directors, that the first publication, giving notice of the special meeting and asking for proxies to be voted thereat, was authorized by a majority of the directors at a meeting thereof, at which the secretary was directed to call the stockholders' meeting and that such authorization was within the scope of the powers and duties of the board of directors, the expense of that publication is a legitimate charge against the corporation for which the plaintiff may recover; but where it appears that the other three notices were not authorized by any lawful resolution or other action of the board of directors at any meeting thereof, but were merely signed by the majority of the directors, and that such notices were merely appeals for proxies to be used by one faction in its contest with the other for the control of the corporation, or a statement by such faction of its side of the controversy, it must be held that the publication of such notices was not, and could not have been, lawfully authorized by the board of directors; and that such notices bore, upon their face, sufficient notice to the plaintiff that they

CORPORATIONS — Continued.

were of a character beyond the limit of anything which could be published in behalf of, or at the expense of, the corporation, so that the plaintiff cannot recover for the publication of such notices. The theory that this was an executed contract of which the corporation had received the benefit and for the expense of which it should pay is not sustained by the facts. *Lawyers' Adv. Co. v. Cns. Ry. L. & R. Co.* 895

When appropriation by director of corporation of corporate funds for political purposes does not constitute larceny.

See **CRIMES**, 7.

Judgment directing foreclosure of trust mortgage.

See **MORTGAGE**, 1, 2.

COURT OF APPEALS.

When certification not required upon appeal to, from unanimous decision.

See **APPEAL**, 1, 2.

Questions of law in criminal cases reviewed only when raised by exception.

See **APPEAL**, 3.

Cannot review judgment of Appellate Division rendered in criminal action originating in Court of Special Sessions.

See **APPEAL**, 4.

When cannot answer certified question.

See **APPEAL**, 5.

Stipulation as to evidentiary facts does not enable Court of Appeals to consider facts unanimously affirmed.

See **CORPORATIONS**, 4.

CRIMES.

1. *Murder — When Erroneous Instruction as to Degree Is Harmless.* Where, upon the trial of an indictment for murder, the court has charged that in case the jury has reasonable doubt as to the defendant's guilt of murder in the first degree its duty is to determine as to whether he was guilty of murder in the second degree and if in doubt as to that degree, its duty is to acquit, a refusal to charge that it might convict of manslaughter in one of its degrees is erroneous, if there is any evidence bringing the case within the definition of manslaughter in the first degree. Such error, however, is harmless where the defendant is convicted of murder in the first degree, thus indicating that the jury had no doubt as to his guilt of the greater offense; therefore, the failure to instruct that it had the right to convict of manslaughter in the first degree, a lesser degree than that of murder in the second degree, could not have prejudiced the defendant. *People v. Granger.* 67

2. *Murder — Insanity — Sufficiency of Evidence.* The evidence upon the trial of an indictment for murder examined, particularly that relating to a defense that the crime was committed while the defendant was under the influence of epileptic furor, and held, that it was not only sufficient to sustain a verdict convicting him of the crime of murder in the first degree but that there was no reasonable doubt that the homicide was committed by him and that he knew the nature and quality of the act he was doing and that the act was wrong. *People v. Furlong.* 198

3. *Evidence — Admissibility of Statements Made by Defendant to Medical Expert Who Examined Him During the Trial and Subsequently Related Them to Jury — Use of Minutes of Stenographer Who Attended Examination in Interrogating Expert.* Statements made by defendant to a medical expert who, at the request of the court, had examined him after warning

CRIMES — *Continued.*

him that his answers to questions might be used against him, and subsequently related to the jury by such expert, are not incompetent as within the constitutional prohibition against compelling a defendant to give testimony against himself; nor does the fact that several of the questions to and answers by the defendant were read to the jury from the minutes of a stenographer who had attended the examination, after such expert had sworn that the questions were so put to the defendant and answered by him, instead of the witness giving separately each question and answer from his unaided memory or after refreshing his recollection, constitute error. *Id.*

4. *Reason for Exclusion of Defendant's Statements as to Transactions Prior to Time of Trial, Not Applicable to Trial in Behalf of People.* While unsworn statements by the defendant as to transactions prior to the time of the trial cannot be given in evidence in his behalf to be used as a basis for an expert opinion as to his sanity at the time of the commission of the crime, the reason for excluding such testimony is not applicable where the statements are for use on a trial, in behalf of the people. *Id.*

5. *One Arrested on a Criminal Charge by Information Entitled to Writ of Habeas Corpus Before Examination — Warrant Is a Nullity in the Absence of Any Evidence to Sustain It.* One arrested under a warrant issued by a magistrate charging him with a crime is not obliged to await an examination, but may at once resort for his protection to the writ of habeas corpus. (Code Civ. Pro. §§ 2015-2019; Code Crim. Pro. §§ 188-197.) The court upon such a proceeding will look back of the warrant and see if the facts stated in the depositions of the prosecutor and his witnesses conferred jurisdiction upon the magistrate to issue it (Code Crim Pro. § 149); and unless there is some evidence to sustain it, the warrant is a nullity and the defendant is entitled to his discharge. *People ex rel. Perkins v. Moss.* 410

6. *Evidence — When Defendant's Declaration as to Intent with Which an Alleged Criminal Act Was Committed Is Conclusive.* The adoption, in its entirety, by the district attorney, of a letter written by the defendant, containing an explanation of his acts and affirmatively disclaiming any purpose to violate the law and which was used as proof of the facts upon which the prosecution based an application for a warrant of arrest for grand larceny, must be regarded as the use of a prior declaration made by the defendant, it was equivalent to his examination; and as such declaration affirmatively denied the existence of any criminal intent, and there was no inherent improbability therein and no other evidence from which such intent could be inferred, the magistrate had no jurisdiction to issue the warrant. *Id.*

7. *Grand Larceny — Appropriation by Director of Corporate Funds for Political Purposes — In Absence of Evidence Establishing Felonious Intent, Magistrate Has No Jurisdiction to Issue Warrant of Arrest.* An information upon which a warrant of arrest was issued, charging the defendant with the crime of grand larceny in the first degree, contained in substance the following facts: The president of an insurance company, in whom was vested, and who had for years been exercising, the power to make disbursements of the corporate funds upon his sole authority, had agreed that the insurance company would contribute to the presidential campaign fund of the Republican national committee up to the amount of \$50,000, and to protect the company against other demands for political purposes he requested the defendant, one of the company's trustees, to personally carry out the agreement by advancing the money. The defendant acquiesced in the president's request, advanced the money and, subsequently, the president brought up the subject of his reimbursement, informally, before a full attendance of the members of the finance committee of the company. The president's purpose was not that the finance committee should take

CRIMES — Continued.

official action in the matter, but that the trustees should be informed of what he had done, and that he might have their opinions upon the matter. It was the general opinion that the president should cause the relator to be reimbursed for his advances out of the corporate funds; what was brought before this body of the company's trustees was the claim or right of the defendant to be paid the moneys which he had paid out by the procurement of the president, in order that the latter's agreement on behalf of the company might be carried out; the president, exercising the executive power, with which he appears to have been clothed, directed the treasurer of the company to draw a check for the amount of the defendant's claim, which was made payable and delivered to the firm of which defendant was a member; the day before the issuance of the warrant the defendant, at the request of the district attorney, wrote a letter stating in substance that the moneys alleged to have been feloniously appropriated were received by him in satisfaction of his claim; that he had acted in the honest belief that he was benefiting the company, and had derived no personal advantage; this letter was used by the prosecution as proof of the facts upon which the application for the warrant was based. *Held*, that the defendant might be regarded as having aided and abetted the act of the president of the corporation in contributing corporate funds for the purposes of a political campaign; that such act, at the time in question, was neither a common-law nor a statutory crime, although it was beyond the purposes of the corporation and was wholly unjustifiable and illegal; that when the defendant took part in the appropriation of the moneys in question, unless he did so *animo furandi*, with the intent to steal it, he was not properly chargeable with the crime of grand larceny, whatever might be the civil consequences of his act; that the case was not only barren of any other evidence calling for the exercise of the judicial judgment of the magistrate as to whether there was probable cause to believe that the crime charged had been committed, but there being no inherent improbability in defendant's statement that he had acted in the honest belief that he was benefiting the company, in the absence of any evidence contradicting it, the magistrate had no jurisdiction to issue the warrant. *Id.*

8. *Murder — Circumstantial Evidence.* A defendant indicted for a homicide may be found guilty upon evidence which is wholly circumstantial, and where it appears, upon a review of such evidence, that the uncontradicted and unexplained facts and circumstances, proved upon the trial, not only establish the existence of a powerful motive for the commission of the crime by the defendant, but form so complete and strong a chain of evidence as to exclude, beyond a reasonable doubt, every hypothesis save that of defendant's guilt, a verdict convicting him of murder in the first degree will be sustained. *People v. Sexton.* 495

9. *Trial — Cross-Examination by Prosecution of Its Own Witness.* While it is the general rule that a party may not impeach his own witnesses, it is not erroneous for the trial court, in the exercise of its judicial discretion, to permit the district attorney, in examining hostile and unwilling witnesses for the prosecution — the wife and daughter of a defendant indicted for a homicide — to ply them with leading questions and even cross-examine them, in order that the whole of the truth may be elicited, especially where such witnesses contradicted none of their earlier statements tending to favor the defendant, but simply reiterated them. *Id.*

10. *Indictment — When Denial of Motion to Dismiss Not Erroneous — Legality and Sufficiency of Evidence upon Which Indictment Is Found — Code Crim. Pro. § 313.* A motion to dismiss an indictment may be made in any case where it is claimed that the legal evidence received by a grand jury is insufficient to support an indictment, or that alleged evidence is the sole basis therefor, for this is a constitutional right notwithstanding the provisions of section 313 of the Code of Criminal Procedure

CRIMES — Continued.

to the contrary, and the right to make such a motion, implies the right to have an adverse decision reviewed by the Court of Appeals upon an appeal from a judgment of conviction in a capital case; but where the moving affidavits are vague and unsatisfactory and the court's attention is directed to no illegal evidence that was presented to the grand jury, and the general charge that the evidence was insufficient is supported by no direct or definite statements, a denial of the motion upon the grounds that the evidence was sufficient to sustain the indictment, and that none of the evidence was illegal, will be sustained. *Id.*

11. *Reception by Grand Jury, of the Unsworn Testimony of Infants under Twelve Years of Age—When Examination as to Intelligence of Such Witnesses by Grand Jury Is Sufficient Compliance with Law—Code Crim. Pro. § 392.* The fact that two of the witnesses, who were examined before the grand jury, were children under the age of twelve years, although they were neither sworn nor examined as to their intelligence pursuant to the statute (Code Crim. Pro. § 392), by the justice who presided at the term during which the defendant was indicted, does not affect the validity of the indictment, where the justice, before whom a motion to dismiss was made, and who examined the minutes of the grand jury, decided that there was sufficient other evidence to sustain the indictment; but where it appears from the affidavit of the district attorney, upon the motion to dismiss the indictment, that the statute was literally complied with in the examination of the children before and by the grand jury, such examination is a sufficient compliance with the statute, since a grand jury, although a part of the court with which it is convened, is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules; and, as the statute (Code Crim. Pro. § 392) authorizing the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen, the grand jury has the power to determine for itself the qualifications of such witnesses so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances. *Id.*

Questions of law in criminal cases raised only by exception.

See APPEAL, 3.

Judgment of Appellate Division rendered in criminal action originating in Court of Special Sessions not reviewable.

See APPEAL, 4.

DAMAGES.

For conversion of property sold under contract of conditional sale.

See SALE, 2.

DEBTOR AND CREDITOR.

Rate of interest upon claims of creditors of insolvent trust company.

See CORPORATIONS, 9.

DECEDENT'S ESTATE.

1. *Judgment—Res Adjudicata.* Where a second suit, although between the same parties, is upon a different cause of action, a judgment is not conclusive as to all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein. *Griffen v. Keese.* 454

2. *Same.* A surrogate's decree, in a proceeding for the settlement of executors' accounts, that an annuity fund as then proposed to be constituted by trustees under the will was proper and reasonable to produce the annuities required, from which no appeal was taken, is *res adjudicata* upon the reasonableness of the amount at that time as to all parties to the

DECEDENT'S ESTATE — *Continued.*

proceeding and their descendants. A subsequent judgment in an action for a construction of the will, that one of such descendants, made a party to the action, was not entitled to any share in the distribution of the annuity fund as such, and the unappropriated income thereof, either theretofore made or thereafter to be made, in which the question as to the reasonableness of the amount of the fund was not raised and from which no appeal was taken, is *res adjudicata* upon that issue. While, therefore, such descendant cannot attack the validity of the fund as established by the decree and continued by the judgment, and is prevented from claiming any share in the distribution of the annuity fund as such and the unappropriated income thereof, she may, in a subsequent action for the construction of the will, insist that the annuity fund, which is concededly in excess of that required to produce the annuities, be reduced to a proper amount, and that the excess, together with the unappropriated income thereof, be transferred to the residuary estate in which she has an interest. *Id.*

3. *Will — Transfer to Residuary Estate of Amount in Excess of That Required to Produce Annuities.* A testamentary direction to executors to "set apart and invest a fund sufficient to produce the above annuities, or a sufficient amount of stocks to be held for that purpose or a part of each, which fund and the unappropriated income thereof is on the decease of the annuitants as they respectively die, to be divided among my grandchildren who shall be living at the time of the death of the respective annuitants, *per capita* and not *per stirpes*, only retaining an amount sufficient to produce the required amount for the remaining annuitants," considering the plain language used and the surrounding circumstances, authorizes the reduction of the annuity fund created by the testator, when it is larger than necessary to produce the surviving annuities, to a proper amount for that purpose, and the transfer of the excess together with the unappropriated income thereof, to the residuary estate. *Id.*

Action to recover moneys alleged to have been obtained from decedent by fraud — when defendant may testify as to personal transactions.

See EVIDENCE, 1, 2.

Transfer tax — rate not affected by assignment of legacy — legacy to child of adopted daughter — construction of phrase "lineal descendant."

See TAX, 1-4.

When testamentary fund invested in securities at a premium must be kept intact by deduction of interest.

See TRUSTS.

Equitable conversion — contingent remainder.

See WILL, 1.

DEFENSE.

When railroad company sued for conversion of goods delivered to it for transportation may set up its ownership of the goods as a defense.

See CONVERSION.

DIRECTORS.

Of corporation — authority of, to incur expense of publishing notice of special election and of calls for proxies.

See CORPORATIONS, 10.

When appropriation by director of corporation of corporate funds for political purposes does not constitute larceny.

See CRIMES, 7.

EASEMENTS.

Action against elevated railroad company to recover for damages to.

See RAILROADS, 5-10.

Appropriation of, by erection of extra elevated railroad track — when injunction denied.

See RAILROADS, 11, 12.

ELECTIONS.

Publication of list of registration and polling places in New York city.

See MANDAMUS, 3.

ELEVATED RAILROADS.

Action for damages to easements of abutting property.

See RAILROADS, 5-10.

Denial of mandatory injunction compelling removal of track.

See RAILROADS, 11, 12.

EMINENT DOMAIN.

1. *Condemnation Proceedings — Objection by Property Owner.* While there is no specific provision in the Condemnation Law (Code Civ. Pro. § 3357 *et seq.*) for questioning the sufficiency of a petition in condemnation proceedings by objection on the part of the property owner, such method of procedure has been sanctioned by the courts for many years. *Bell Telephone Co v. Parker.* 299

2. *Property or Interest to Be Condemned Must Be Accurately Described in Petition.* It is not enough in a proceeding to condemn an interest in land for public purposes to describe the interest sought to be acquired so vaguely as to leave it dependent upon the undisclosed opinion of the condemning party as to the quantum of the interest which it may be deemed necessary to take. *Id.*

3. *Same — Telephone Line — Proceedings to Acquire Right to Trim Trees in Order to Protect Line from Interference — When Petition Insufficient.* Where a petition in condemnation proceedings, instituted to acquire title to certain property, describes the property to be taken as "an easement or right of way for the erection, maintenance and operation of a line of telephone, said line to consist of" a designated number of poles, to be set at designated places, with the right to attach the necessary wires or cables thereto, "and with the right to trim such trees as may be necessary to protect said line from interference," the petition is insufficient because it fails to describe the property, rights and easements sought to be acquired with sufficient particularity to be a compliance with the provisions of the Condemnation Law (Code Civ. Pro. § 3360, sub. 2), in that it is not sufficiently specific in stating the extent of the right which the petitioner desires to acquire "to trim such trees as may be necessary to protect said line from interference;" since the precise distance to which such trees must be trimmed to maintain the safety of the line should be stated in the petition in order that the property owner may be informed in advance as to the extent of the interest which the condemning party seeks to acquire, and in order that the commissioners may be similarly guided in measuring their award. *Id.*

See *City of Rome v. Whiteston W. W. Co.* (Mem.), 542.

EQUITY.

When will deny injunction upon ground of great public or private mischief.

See RAILROADS, 11, 12.

ESTATES.

Transfer to residuary estate of amount in excess of that required to produce annuities.

See DECEDENT'S ESTATE, 3.

Transfer tax — rate not affected by assignment of legacy — legacy to child of adopted daughter — construction of phrase "lineal descendant."

See TAX, 1-4.

When testamentary fund invested in securities at a premium must be kept intact by deduction of interest.

See TRUSTS.

Equitable conversion — contingent remainder.

See WILL, 1.

When absolute gift is cut down to life estate — designation of trustees as executors does not invalidate trust provisions — when trust not void as suspending power of alienation.

See WILL, 3-5.

Bequest to hospital under erroneous name — sufficient designation of beneficiary — valid gift to charitable association.

See WILL, 6, 7.

EVIDENCE.

1. *Personal Transactions with Decedent* — *Code Civ. Pro.* § 829. The object of the enactment of the limitation of section 829 of the Code of Civil Procedure, relating to the examination of a party, etc., was to so carefully balance rights that the survivor should not take advantage of a deceased person, and the personal representatives should not take advantage of a survivor. The party for whose protection the limitation was made may keep the door closed if he chooses, but if he opens it at all, he opens it wide as to any transaction concerning which he examines the survivors. *Cole v. Sweet.* 488

2. *Action to Recover Moneys Alleged to Have Been Obtained from Decedent by Fraud* — *When Defendant May Testify as to Personal Transactions.* Where, in proceedings to settle executor's accounts, a residuary legatee claiming that the executor had failed to recover moneys obtained by a party from the testatrix by undue influence and fraud, partially examines such party as to personal transactions with the deceased, and it being concluded that the surrogate had no jurisdiction, the proceedings are suspended and such legatee induces the executor as nominal plaintiff to bring an action to recover the amount, and in such action he introduces in evidence the statements of defendant made in the proceeding before the surrogate, he thereby waives his privilege under section 829 of the Code of Civil Procedure, and the defendant is entitled to testify as to the whole of any transactions about which she was examined in the proceeding; since if the representative of decedent speaks himself or compels the survivor to tell a part, he waives the right to object to his telling the rest. *id.*

Sufficiency of, on trial for murder — admissibility of statements made by defendant to medical expert who examined him during trial — use of minutes of stenographer — defendant's statements as to transactions prior to time of trial admissible on behalf of people.

See CRIMES, § 4.

When defendant's declaration as to intent with which an alleged criminal act was committed is conclusive.

See CRIMES, 6.

EVIDENCE — *Continued.*

Circumstantial — cross-examination by prosecution of its own witness — legality and sufficiency of evidence upon which indictment for murder is found — witnesses under twelve years of age.

See **CRIMES**, 8-11.

How testimony of special agents of state excise commissioner as witnesses for the state should be considered.

See **EXCISE**, 1.

Impeachment of witness — evidence of repairs to machine after accident — incompetent — evidence that witness was nearly injured by the machine which injured plaintiff incompetent.

See **NEGLIGENCE**, 2-4.

Insufficient proof of negligence.

See **NEGLIGENCE**, 11, 12.

Of elevated railroad company's failure to act upon alleged consent — testimony of deceased witness read on new trial — when error in admission of evidence as to value is cured — evidence of general appreciation of values in other localities.

See **RAILROADS**, 5-10.

EXCISE.

1. *Special Agents of State Excise Commissioner — When Acting in Discharge of Their Duties They Are Public Detectives — How Their Testimony as Witnesses for the State Should Be Considered.* The special agents appointed by the state commissioner of excise under section 10 of the Liquor Tax Law (L. 1896, ch. 112, as amd. by L. 1897, ch. 312, and L. 1903, ch. 486) for the purpose of investigating matters connected with the sale of liquors, and in cases of criminal violations of the statute to make verified complaints thereof, are detectives, but public and official detectives as distinguished from private detectives; they are public officers engaged in the performance of duties prescribed by statute, and should not be treated by the courts or juries as private detectives, or with the suspicion that is associated with mere spotters, paid informers, and those that are given compensation dependent upon certain results being obtained; neither should the relation of special agents to the case in which they are witnesses be wholly withdrawn from the consideration of the jury. *Cullinan v. Furthman.* 160

2. *Erroneous Charge as to the Weight to Be Given to Testimony of Such Special Agents.* Where, upon the trial of an action brought by the state commissioner of excise upon a bond, given pursuant to section 18 of the Liquor Tax Law, for a violation of the provisions thereof by selling liquor on Sunday, the evidence for the plaintiff consisted of the testimony of the two special agents who had made the complaint, the evidence for the defendants consisting only of denials by the saloonkeeper, and the trial court had properly charged, in effect, that the jury might find whether or not the credibility of the special agents as witnesses was affected by their zeal in the performance of their duty, and then to give effect and credit to their evidence according to such finding it is reversible error to further charge, at the request of the plaintiff, to the effect that the special agents were witnesses in discharge of their duty and must not in any sense be treated as detectives, and that their testimony was entitled to the same weight as other disinterested witnesses, subject, of course, to the same tests as to its truthfulness, since such charge removed from the consideration of the jury the right to include in their tests of the truthfulness of the testimony of the agents, all consideration whatever of

EXCISE — Continued.

the agents' relation to the case and the manner in which they had obtained the information upon which their testimony was based. *Id.*

3. *Erroneous Charge as to Duties of Special Agents Based upon Facts Not Established by Evidence.* It is reversible error also for the court to charge that the special agents were sent "for the purpose of ascertaining the truth apparently of rumors that had reached the department with reference to this man's place," where there was no evidence that rumors had reached the department concerning the saloonkeeper's place; certain reports had been made by the special agents, but there was no testimony relating to general rumors concerning the defendant's place of business. *Id.*

4. *Liquor Tax Law — Proceedings for Revocation of Certificate — Reference to Take Proofs Unauthorized — L. 1905, Ch. 680.* Upon the return of a petition and order to show cause in a proceeding for the revocation of a liquor tax certificate, instituted under subdivision 2 of section 28 of the Liquor Tax Law (L. 1896, ch. 112, as amd. L. 1905, ch. 680), where the answer to the petition has been filed, the Supreme Court at Special Term has no power to refer the matter to a referee to take the proofs and report the testimony to the court for its hearing and final determination. The power to refer having been omitted from the amendatory statute of 1905, the legislature must be assumed to have intended to change the practice in this regard. *Matter of Clement v. Hegeman & Co.* 274

FARE.

Rates of, on street railroads.

See RAILROADS, 1-3.

FIREMEN.

Remedy of retired member of New York fire department aggrieved by action of commissioner in fixing pension is by direct proceeding not by action.

See NEW YORK (CITY OF), 2.

FISH AND GAME.

1. *Forest, Fish and Game Law — Prohibition against Fishing in Certain Waters — Provision of Section 156 as to Filing of Regulation Mandatory.* That provision of section 156 of the Forest, Fish and Game Law (L. 1900, ch. 20; L. 1901, chs. 94, 662) requiring a copy of a regulation prohibiting fishing in certain waters to be "filed in the office of the clerk of the town to which the prohibition or regulation applies," is mandatory, rather than directory, not simply on account of the form of the command, but also because the object is to furnish an official record near at hand for convenient examination by those who wish to know whether fishing in a given stream has been prohibited by a local regulation; and the requirement must be strictly complied with. *People v. Worden.* 322

2. *Insufficient Description of Creek Affected.* Where the commissioner, upon the request of a town board, ordered that the waters of a specified creek and its tributaries should be closed for a prescribed period, but no copy of the order or minutes of the commission was filed in the office of the clerk of the town, a paper attached to the petition, prohibiting all persons from fishing "in this stream within this town" and filed with the clerk, is of no effect as a record in a public office, not only because it was not a copy of the regulation made, but because it fails to identify or describe, by name or otherwise, any stream to which a prohibitive regulation could apply; and although copies of the paper were posted along the creek specified, in the manner required by statute, the failure to file the requisite regulation is a good defense to an action to recover the prescribed penalties. *Id.*

FORECLOSURE.

Trust mortgage — judgment directing foreclosure sale of property, the title to which remained in vendor — when vendor cannot insist upon sale of mortgaged property for its sole benefit.

See MORTGAGE, 1, 2.

Tax title paramount to lien of prior mortgage — owner not a proper party in foreclosure action.

See REAL PROPERTY, 4.

FOREST PRESERVATION.

Sufficiency of complaint in action to restrain waste of lands acquired by Cornell University for a college of forestry.

See STATE, 1-3.

FORGERY.

See *People v. Gianvecchio* (Mem.), 556.

FORMER ADJUDICATION.

Conclusiveness of.

See DECEDENT'S ESTATE, 1, 2.

FRANCHISES.

For electric lighting in New York city — power to grant, in whom vested.

See NEW YORK (CITY OF), 1.

FRAUD.

See *Thalman v. I. & T. Nat. Bank* (Mem.), 540.

GUARDIAN AND WARD.

When testamentary appointment of guardians is void.

See WILL, 2.

HABEAS CORPUS.

When one arrested on a criminal charge by information entitled to a writ of, before examination.

See CRIMES, 5.

HIGHWAYS.

When village not liable for injury to a horse caused by his stepping upon a loose stone in highway.

See NEGLIGENCE, 8.

Driving animals upon — when owner liable for trespass of animals straying on unfenced private lands.

See TRESPASS.

HUSBAND AND WIFE.

When wife's interest in policy of life insurance issued for her benefit is contingent and does not pass by her will.

See INSURANCE, 1, 2.

INCOMPETENT PERSONS.

1. *Insane* — *Appointment of Committee for Insane Life Convict*. Under the provisions of chapter 401 of the Laws of 1889 the Supreme Court has jurisdiction, upon the application of the persons mentioned therein, to entertain proceedings and direct the appointment of a committee of the estate of a life convict, although the convict before the commencement of the proceedings had become insane and had been transferred to a state hospital for insane convicts; the statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced, whether the convict should thereafter become insane or not and was not repealed

INCOMPETENT PERSONS — *Continued.*

by the enactment in 1895 of section 2323a of the Code of Civil Procedure, providing for the appointment of a committee upon the application of a state officer having special jurisdiction over the institution or by the superintendent thereof, "where an incompetent person has been committed to a state institution in any manner provided by law and is an inmate thereof." *Trust Co. of America v. State Safe Deposit Co.* 178

2. *Appointment of Committee Cannot Be Attacked Collaterally in Action to Recover Convict's Estate.* Objections that the petition for the appointment of the committee failed to state the age of the petitioner or of any other parties, or whether they or any of them were incompetent cannot be raised by demurrer in an action by the committee to recover the convict's estate, the proceedings having been in a court of general jurisdiction and therefore are not open to a collateral attack in such an action. *Id.*

See Williams v. Buckley (Mem.), 515.

INDICTMENT.

When denial of motion to dismiss not erroneous — legality and sufficiency of evidence upon which indictment is found.

See CRIMES, 10.

INJUNCTION.

See Royce v. Bell Telephone Co. (Mem.), 543.

INSOLVENCY.

Rate of interest upon claims of creditors of insolvent trust company.

See CORPORATIONS, 9.

INSURANCE.

1. *Testamentary Disposition by Wife of Policy of Life Insurance Issued for Her Benefit.* The statutes relating to life insurance issued for the benefit of a married woman, and authorizing her to dispose by will of the policy of insurance, refer to a contract made by her in her own name or in the name of a third person, with his assent as her trustee, for insurance upon the life of her husband, and not to a contract made by him for her benefit. *Brads'aw v. Mut. L. Ins. Co.* 347

2. *When Wife's Interest in Policy Is Contingent and Does Not Pass by Her Will.* A wife has a contingent, not an absolute, interest in a policy of life insurance issued upon the application of her husband, who paid the premiums and made it payable to her "for her sole use, if living, in conformity with the statute, and if not living to their children or their guardian for their use;" her interest is solely dependent upon her surviving her husband, and in that event only is she entitled to dispose of the policy by will; in case of her death without issue, before her husband, the proceeds upon his death pass, not to her, but to her husband's executors. *Id.*

See Cilley v. P. A. Ins. Co. (Mem.) 517; People's Bank v. Cushman (Mem.), 518; Baker v. Met. Life Ins. Co. (Mem.), 562; McCarthy v. Order of Foresters (Mem.), 565.

INJUNCTION.

Denial upon ground of great public or private mischief — denial of mandatory injunction compelling removal of railroad track.

See RAILROADS, 11, 12.

INSANE.

Appointment of committee for insane life convict — when cannot be attacked collaterally.

See INCOMPETENT PERSONS, 1, 2.

INTEREST.

Rate of, upon claims of creditors of insolvent trust company.

See CORPORATIONS, 9.

On accounting for use and occupation of land.

See REAL PROPERTY, 5.

JUDGMENT.

See Gittings v. Russel (Mem.), 538.

Former adjudication.

See DECEDENT'S ESTATE, 1, 2.

Directing foreclosure of trust mortgage.

See MORTGAGE, 1.

LANDLORD AND TENANT.

Assignment of Rent Accruing Subsequent to Extension of Term. In an action by the grantee of leased premises to recover rent, it appeared that the lease was for a year, with the privilege to the defendant "to extend it for a further term of one or two years upon the same terms and conditions;" that the landlord had assigned the rents accruing thereunder to a creditor, to the extent of the sum in which he was indebted; that prior to the expiration of the term and before the defendant had notified the landlord of his intention to extend it, the latter conveyed the premises to the plaintiff, who had knowledge of the assignment; that thereafter the defendant extended the term; that the rents accruing prior to the extended term being insufficient to satisfy the claims of the assignee, the defendant paid him the rent for two months thereof, which the plaintiff seeks to recover. *Held*, that the defendant's liability to pay rent accrued under the original letting, and not by virtue of any new agreement, express or implied, and the rent sued for passed by the assignment. *Suan v. Indeblid.* 372

Lease of land for term of years and renewals thereof — title to buildings on leased land.

See LEASE, 1, 2.

LARCENY.

See People v. Koller (Mem.), 572.

When appropriation by director of corporation of corporate funds for political purposes does not constitute larceny.

See CRIMES, 7.

LEASE.

1. *Lease of Land for Term of Years and Renewals Thereof — Ownership of Buildings on Land at Expiration of Last Term.* Where an instrument in writing renewing for a third term a lease of land for a term of years, executed by the persons succeeding to the interests of the parties to the first and second leases, contained all of the covenants of the preceding leases relating to the renewal of the lease for a further term except one, which provided that the lessor should on the expiration of the term pay for a building erected on the land by the first lessee, in the event that no further lease should then be granted, but in lieu thereof provided that at the expiration of such term the lessee would peaceably and quietly surrender the premises to the said lessor, the said lessee has, at the expiration of said third term, no right to remove the building from the land, since by the omission of the covenant reserving the title to the building it became, by operation of law, a part of the land and the lessee lost any right of ownership that she or her predecessors in title might have had under the first and second leases. *Precht v. Howard.* 136

2. *When Lessor Not Estopped from Asserting Title to Buildings on Leased Land by Extension of Option to Renew Lease.* Where such lessor and the person who had succeeded to the rights of the lessee under such third

LEASE — *Continued.*

lease entered into a contract, on the day before the expiration of the lease, which extended for a period of thirty days, the time within which the lessor should exercise her option either to grant a further lease for twenty-one years, or for the purchase of the house on the land, as provided by the terms of the then existing lease. "without prejudice of any rights to the parties hereto under the terms of said lease," and also provided that the lessor should have the right to re-enter the premises at the end of the extended period and, upon receiving from such lessee a conveyance of the building and a surrender of the lease, should pay such lessee a stipulated sum for the building, whereupon, and in conformity with such agreement, the lessee tendered to the lessor a conveyance of the building, which she declined to accept; the lessee cannot recover from the lessor the agreed price of the building, upon the ground that the execution of such agreement by the lessor led the lessee to waive her right to remove the building during the continuance of the term and that, therefore, the lessor is estopped from asserting her ownership of the building, since the mere extension for thirty days of the time within which the lessor might have exercised her option to give the lessee a new lease had no effect upon the ownership of the building, for that had been fixed by operation of law during the period of the preceding twenty-one years, especially where it is apparent from the terms of such agreement that the extension was granted under a radical misapprehension or misstatement of fact and where no new consideration, either pecuniary or obligatory, entered into the transaction. *Id.*

LEGACIES.

Rate of transfer tax not affected by assignment of — legacy to child of adopted daughter.

See TAX, 1-4.

LIENS.

Attorney's lien for services in procuring payment to beneficiary of income of trust fund established for his support and education.

See ATTORNEY AND CLIENT.

Effect of section 116 of the Lien Law upon a contract of conditional sale.

See SALE, 1, 2.

LIQUOR TAX.

Special agents of state excise commissioner — when acting in discharge of their duties they are public detectives — how their testimony as witnesses for the state should be considered.

See EXCISE, 1-3.

Proceedings for revocation of certificate — reference to take proofs unauthorized.

See EXCISE, 4.

LOCAL OPTION.

See Matter of Bufton (Mem.), 537.

MAGISTRATES.

When have no jurisdiction to issue warrant of arrest.

See CRIMES, 5-7.

MANDAMUS.

1. *Proceeding Against an Officer of a Municipality for Enforcement of a Right Not Abated by Resignation or Removal of Officer.* A proceeding against an officer of a municipality for the enforcement of a right of a relator against the municipality does not abate by the resignation, removal or expiration of term of the officer, but may be enforced against his successor or successors. *People ex rel. La Chicotte v. Best.* 1

MANDAMUS — *Continued.*

2. *Same.* Where an assistant engineer in the department of bridges in the city of New York, appointed after passing the civil service examinations, who was suspended without pay by the commissioner of bridges, upon the ground that his services were no longer necessary, under section 1543 of the charter of the city of New York (L. 1901, ch. 466), procured an alternative writ of mandamus to compel his reinstatement, which, after a trial of the issues involved, was decided in his favor, and then moved the court for a final order granting a peremptory writ, the hearing of which motion was postponed from time to time for a period of about two months, when the case was orally argued and time given for counsel to submit written briefs, during which time the commissioner of bridges resigned, and thereupon, and before any decision of the motion for a peremptory writ was made, the corporation counsel of the city, upon affidavits showing the resignation of the defendant, moved for an order declaring the proceeding abated, it is reversible error for the Special Term to quash, supersede and set aside the writ upon the ground that the proceeding had abated. The successor of such commissioner should have been substituted and the proceeding continued against him as the defendant therein. *Id.*

3. *Election Law — Borough of Manhattan — Publication of List of Registration and Polling Places in Party Newspapers — Test Prescribed by Statute in the Selection and Appointment of Such Newspapers.* The Election Law (L. 1896, ch. 909, § 10, as amd. by L. 1906, ch. 259) which provides that, in the borough of Manhattan, the board of elections shall publish a list of the registration and polling places in such borough in four newspapers advocating the principles of the party polling the highest number of votes at the last preceding election for governor, and also in four other newspapers advocating the principles of the political party polling the next highest number of votes, prescribes no test, in the selection and appointment of newspapers to publish the list, except that they shall advocate the principles of such parties; the courts have no power, therefore, to grant a peremptory writ of mandamus requiring the board of elections to publish the list in four newspapers which support the candidates nominated, and the platform adopted, at a certain convention held by one of the parties designated in the statute; and an order of the Appellate Division reversing an order of the Special Term granting such a writ, and directing that a mandamus issue requiring the board to publish the list in four newspapers which advocate the principles of such party is correct and should be affirmed. *People ex rel. Quinn v. Voorhis.* 327

MARRIED WOMEN.

When wife's interest in policy of life insurance issued for her benefit is contingent and does not pass by her will.

See INSURANCE, 1, 2.

MASTER AND SERVANT.

Liability of master for defective machinery.

See NEGLIGENCE, 1.

When employee is not a superintendent within meaning of Employers' Liability Act — negligence or error in judgment of co-servant.

See NEGLIGENCE, 9.

Liability of master — insufficient proof of negligence.

See NEGLIGENCE, 11, 12.

MIDDLETOWN (CITY OF).

Requirement in charter as to written notice of existence of snow or ice on sidewalks constitutional.

See MUNICIPAL CORPORATIONS, 1, 2.

MORTGAGE.

1. *Trust Mortgage — Judgment Directing Foreclosure Sale of Property, the Title to Which Remained in Vendor.* In an action to foreclose a trust mortgage given to secure the bonded indebtedness of a corporation, it appeared that after the execution of the mortgage the corporation had purchased a pumping plant under a contract providing that the title thereto should remain in the vendor until final payment; that more than half of the purchase price had been paid; that the vendor upon application had been permitted to intervene in the action, and requested that the pumping plant be excepted from the foreclosure sale or the balance due be first paid from the proceeds thereof. *Held*, that a judgment directing that it should be first paid from the proceeds of the sale could not be justly complained of by the general creditors. *Washington Trust Co. v. Morse I. W. & D. D. Co.* 807

2. *When Vendor Cannot Insist upon Sale of Mortgaged Property for Its Sole Benefit.* Where, during the pendency of the foreclosure action, bankruptcy proceedings had been instituted, and subsequent to the judgment, but before a sale pursuant thereto, the trustee in bankruptcy sold the interest of the mortgagor to a new corporation formed to take over the property of the bankrupt which paid off the mortgage indebtedness and obtained a discharge of the mortgage, but failed to pay the balance due the vendor, and thereafter procured a stay of the sale of the premises under the foreclosure decree, the vendor not having under its contract any lien upon or interest in the mortgaged premises, and not having obtained through its intervention any lien or interest that it did not theretofore possess, has no right to insist upon a sale independently and solely for its benefit of the mortgaged property. It has, however, the right to remove or sell the pumping plant in case of default in payment of the balance due thereon. *Id.*

See Huntington v. Kneeland (Mem.), 533.

Tax title paramount to lien of prior mortgage — owner not a proper party in foreclosure action.

See REAL PROPERTY, 4.

MUNICIPAL CORPORATIONS.

1. *Right of Action against City for Negligence in Care of Streets Purely Statutory and Subject to Restriction at the Pleasure of the Legislature.* The duty imposed upon a municipality of caring for its streets and sidewalks is not private or local, so that a liability for its breach is enforceable by a common-law action, as in the case of a private corporation, but is performed as a political agency, and is governmental. The liability may be created or not as the legislature may see fit; if created, its enforcement may be surrounded with any restrictions or conditions deemed necessary. The right to enforce it, therefore, is not a common-law right of which the owner cannot be deprived without due process of law, but is purely statutory and may be destroyed or restricted at the pleasure of the legislature. *MacMullen v. City of Middletown.* 37

2. *Constitutional Law — Requirement in Charter as to Written Notice of Existence of Snow or Ice on Sidewalks Constitutional.* A provision in a municipal charter relieving the city from liability for injuries resulting from an accumulation of snow and ice on a sidewalk unless written notice of such accumulation is actually given to the common council, and there is a failure within a reasonable time to cause its removal, is constitutional and valid, is an essential part of a cause of action against the city for such injuries, and compliance with its requirement as to giving the written notice specified must be alleged and proved. *Id.*

Proceeding against an officer of a municipality for enforcement of a right, not abated by resignation or removal of officer.

See MANDAMUS, 1, 2.

MUNICIPAL CORPORATIONS — *Continued.*

Power to grant franchise for electric lighting in New York city — in whom vested.

See NEW YORK (CITY OF).

MURDER.

Trial for — when erroneous instruction as to degree is harmless.

See CRIMES, 1.

Trial for — insanity — sufficiency of evidence — admissibility of statements made by defendant to medical expert during trial — use of minutes of stenographer who attended examination — reason for exclusion of defendant's statements as to transactions prior to time of trial, not applicable to trial in behalf of people.

See CRIMES, 2-4.

Trial for — circumstantial evidence — cross-examination by prosecution of its own witness — when denial of motion to dismiss indictment not erroneous — legality and sufficiency of evidence upon which indictment is found — when examination by grand jury as to intelligence of witnesses under twelve years of age is sufficient compliance with law.

See CRIMES, 8-11.

NEGLIGENCE.

1. *Liability of Master for Defective Machine.* Where in an action by an employee to recover damages for injuries received while using a machine, it appears that the accident resulted from a bolt dropping out of place by reason of the falling off of a nut; that this had happened on several prior occasions to the knowledge of the plaintiff; that the nut had been tightened on the morning of the accident; that the trial court charged that no recovery could stand against the defendant because he used a defective machine and that his only duty in respect thereto, so far as plaintiff was concerned, was to repair it, that is, to replace the bolt from time to time as it dropped out, it is reversible error to refuse to charge that before imposing any liability upon the defendant for failure to tighten the nut, the jury must find that the defendant had notice, or by reasonable care could have obtained knowledge that the nut had become loose again after being tightened in the morning. *Loughlin v. Brassil.* 128

2. *Evidence — Impeachment of Witness.* Statements alleged to have been made by a witness on several occasions after the accident, contradictory of his testimony on the trial, are improperly received in evidence where it appears that his attention had been called to these occasions in such a vague manner as to render it doubtful whether or not he understood which one of the occasions he was interrogated about, and hence no foundation was laid for their admission. *Id.*

3. *Evidence of Repairs to Machine After Accident Incompetent.* The reception of evidence that such witness had said after the accident "the press was now fixed all right" also constitutes error. *Id.*

4. *Evidence That Witness Was Nearly Injured by the Machine Which Injured Plaintiff, Incompetent.* The reception of evidence that such witness had said "that he came near losing both of his hands in the morning," is erroneous where such evidence was not limited to proof that he had been caught, or had said that he had been nearly caught by the machine under the same circumstances alleged to have prevailed when plaintiff met his accident. *Id.*

5. *Inpropriety of Remarks of Counsel as to Defendant's Insurance Against Liability.* Remarks of counsel in summing up, to the effect that there was "no evidence that he (the defendant) was insured, most of these

NEGLIGENCE — *Continued.*

people are," and again, "many people get insured, but there is no evidence of any such thing in this case at all," duly objected to, were entirely improper. *Id.*

6. *Injuries Received by Plaintiff While Examining Unfinished Building at Invitation of Defendants.* The facts examined, in an action brought to recover for injuries received by the plaintiff, by falling through an open and unguarded stairway in a dark place, while examining an unfinished building, for the purpose of renting apartments therein, at the invitation of defendants and accompanied by their agent, and held sufficient to sustain a verdict for plaintiff. *Boyd v. United States Mortgage & Trust Co.* 262

7. *New York (City of) — Liability of Board of Education for Injuries Caused by Falling of Ceiling in School Room.* While the power to repair and keep in condition the public school buildings in the city of New York is not given by the charter to the board of education, so that the board is not liable under the doctrine of *respondet superior* for the negligence of those having in charge the care and repair of such buildings, the board is vested with the management and control of the public schools, including the sole power to close them, so that if there is any negligence with reference to such closing it must be that of the board; and where, in an action brought against the board by a pupil of a public school for injuries received from the falling of the ceiling while occupying a seat assigned to him in a school room, there is evidence that the schoolhouse and ceiling were out of repair; that the ceiling had been examined from time to time by inspectors appointed by the board who had noticed that the ceiling was cracked and liable to fall and had reported such fact to the board, it is liable to the plaintiff for its negligence in allowing the school building to be occupied by pupils after it had knowledge of the unsafe condition of the building and ceiling. *Wahrman v. Bd. Education N. Y.* 321

8. *Highways — When Village Not Liable for Injury to a Horse Caused by His Stepping Upon a Loose Stone in Highway.* While an incorporated village is bound to exercise such reasonable care and diligence in repairing the highways within its corporate limits, and in removing loose stones therefrom, as may be required by the location and the extent of the use of such highways, a village, having many miles of streets and highways within its limits, is not liable for an injury to a horse, as the result of stepping upon a loose stone, in a rarely used road running through an unsettled part of the village and over a steep hill, subjected not only to the washing of surface waters, but to the dragging upon it of the "rough-locked" wheels of descending vehicles, whereby the surface of the road was torn up and deep ruts formed, where there is no evidence that the village was maintaining a nuisance or had created by its positive act, or had permitted to continue, a place of danger in the highway from which the injury might have resulted. The village was not bound to use such care and skill as to render accidents impossible upon its ways or streets; the active vigilance, which is due from it with respect to their maintenance in a fairly safe condition, is a relative term, and to hold the village responsible for the occurrence of the accident in question would be to make of it an insurer against accidents as to all persons using the way. *McKone v. Village of Warsaw.* 336

9. *Master and Servant — When Employee Is Not a Superintendent Within Meaning of Employers' Liability Act (L. 1902, Ch. 600) — Master Not Liable for Injuries Caused to Servant by Negligence or Error in Judgment of Co-servant.* Where it appears, in an action brought to recover for the death of plaintiff's intestate caused by the breaking of a defective ladder negligently selected for decedent to work upon by an alleged superintendent of the defendant, that the decedent was in the service of the defendant as a helper to a steamfitter, or plumber, also working for the

NEGLIGENCE — *Continued.*

defendant; that the latter was employed by the defendant solely as a steamfitter, or plumber, and had been occupied as such during the entire time that he had been in the defendant's service; that the steamfitter had no power to hire or discharge the helper, who was employed by the defendant and directed to serve as a helper to the steamfitter; that they worked together as laborers, doing the same class of work, one as the mechanic, fitting or repairing steam pipes, the other assisting him in that work, the relation between them was merely that of co-employees; and, notwithstanding the fact that it was the helper's duty to obey the directions of the steamfitter with reference to their work, the steamfitter did not occupy the position of, and had never been intrusted with, the powers of a superintendent within the meaning of the Employers' Liability Act (L. 1902, ch. 600). The defendant is not liable, therefore, for the negligence, or error in judgment, of the steamfitter in selecting, for the helper to work upon, an old and defective ladder, which broke and caused the helper to fall, whereby he received injuries from which he died, when there were numerous other ladders upon the premises from which a safe and suitable ladder could have been selected. *McConnell v. Morse I. W. & D. D. Co.* 341

10. *Death Caused by Falling from Elevator — Erroneous Nonsuit.* The facts examined in an action to recover for the death of plaintiff's intestate, who was killed while delivering goods to the defendant in its department store by falling from an elevator through a space between it and the wall, and held, that a nonsuit was erroneously granted where, considering both the evidence received and that improperly excluded, questions of fact were presented as to whether decedent could or ought to have seen the opening, and whether the defendant was negligent in maintaining the elevator with a space large enough for a man to fall through and in permitting it to be used by persons delivering freight. *Gray v. Siegel-Cooper Co.* 376

11. *Liability of Master.* Mere proof that an accident has happened is not evidence of a master's negligence; he is not an insurer and is only liable for the exercise of reasonable care and prudence. *Rende v. N. Y. & Texas S. S. Co.* 382

12. *Insufficient Proof of Negligence.* Where the only issue is whether a master has failed to perform his legal duty to provide for his servant a reasonably safe and proper place to work, evidence that the servant was killed by the fall of an iron shutter upon one of the master's vessels, is not sufficient to establish the master's liability for damages, in the absence of proof of some affirmative act or omission constituting negligence on the part of the master, and showing that the servant was free from contributory negligence. *Id.*

See *Duna v. N. Y. C. & H. R. R. Co.* (Mem.), 519; *Coleman v. Interurban St. Ry. Co.* (Mem.), 520; *Duffy v. Met. St. Ry. Co.* (Mem.), 522; *Greenwich Ins. Co. v. Ogdenburg P. & L. Co.* (Mem.), 525; *Poyt v. Roke* (Mem.), 550; *Parks v. City of New York* (Mem.), 555; *Hedorfer v. Ruppert* (Mem.), 560; *Lapicuse v. Syracuse R. T. Ry. Co.* (Mem.), 561; *Walsh v. Fonda, J. & G. R. R. Co.* (Mem.), 563; *Cutlos v. Met. St. Ry. Co.* (Mem.), 564; *Savage v. Brooklyn Heights R. R. Co.* (Mem.), 565; *Green v. Urban C. & H. Co.* (Mem.), 566; *Darienza v. N. Y. City Ry. Co.* (Mem.), 567; *Voorhees v. Hudson River Telephone Co.* (Mem.), 570; *Fish v. Utica, etc., Cotton Mills* (Mem.), 571; *Freemont v. Boston & Maine R. R.* (Mem.), 571; *Witmer v. B. & N. F. El. Light & P. Co.* (Mem.), 572; *McBride v. N. Y. Tunnel Co.* (Mem.), 573; *Brooks v. International Ry. Co.* (Mem.), 574.

When shopkeeper not liable for value of article stolen from customer.

See **BAILEMENT.**

NEGLIGENCE — *Continued.*

In care of streets — right of action against city purely statutory.

See MUNICIPAL CORPORATIONS, 1, 2.

Claim against state for injuries.

See PRACTICE.

Of a railroad conductor in assisting passenger to alight from a car at a station.

See RAILROADS, 4.

NEGOTIABLE INSTRUMENTS.

Rights of bank in commercial paper sent to it for collection — restrictive indorsement.

See BANKING, 1, 2.

NEWSPAPERS.

Publication of list of registration and poiling places in New York city.

See MANDAMUS, 3.

Publication of notices of tax sales and notices of redemption thereof in city of Troy.

See TAX, 5.

NEW YORK (CITY OF.)

1. *Power to Grant Franchise for Electric Lighting Vested in Board of Aldermen. Not Board of Electrical Control, on October 30, 1896.* The power to grant to a corporation organized under the Transportation Corporations Law (L. 1890, ch. 566, § 61, embodying chapter 37 of the Laws of 1848 and chapter 512 of the Laws of 1879), a franchise to lay and construct suitable wires or other conductors in subways under streets, avenues, public parks and places in the city of New York for conducting and distributing electricity, was vested in the "municipal authorities," and on October 30, 1896, those authorities were the board of aldermen and not the board of electrical control, established by chapter 716 of the Laws of 1887, and conferring upon such board certain powers with respect to the occupation of the streets for electric lighting; that act neither expressly nor by implication conferred the power to grant such franchise; the purpose of the act was to regulate the exercise of rights after they had been acquired, not to create them; the power to create them was left precisely where it was before, in the "municipal authorities," i. e., the board of aldermen. *People ex rel. W. S. El. Co. v. Con. Tel. & El. Subway Co.* 58

2. *Fire Department — Remedy of Retired Member Aggrieved by Action of Commissioner in Fixing Pension Is by Direct Proceeding Not by Action — Burden of Proof.* A recovery in an action by a retired fireman of the city of New York to recover arrears claimed to be due on his pension by reason of an alleged unlawful determination of the fire commissioner as to its amount (L. 1901, ch. 466, § 790), even if the action were maintainable, could not be sustained, where the plaintiff fails to meet the burden imposed upon him of proving that the commissioner had violated his duty in fixing the amount of the pension; such action, however, is not maintainable; the remedy of any member of the department aggrieved by the action of the commissioner in determining his pension is to correct that determination by a direct proceeding, such as mandamus, not by action. *Ramsay v. Hayes.* 367

See *People ex rel. O'Connell v. Hayes* (Mem.), 534; *People ex rel. Connolly v. Bd. of Education* (Mem.), 535; *People ex rel. Meehan v. Greene* (Mem.), 545; *People ex rel. Moynihan v. McAdoo* (Mem.), 546.

NEW YORK (CITY OF)—*Continued.*

Proceeding against an officer of, for enforcement of a right, not abated by resignation or removal of officer.

See MANDAMUS, 1, 2.

Publication of list of registration and polling places in.

See MANDAMUS, 3.

Liability of board of education for injuries caused by falling of ceiling in school room.

See NEGLIGENCE, 7.

Rates of fare on street railroads.

See RAILROADS, 1-3.

NOTICE.

Of assignment of interest in trust estate—when sufficient to charge trustee with knowledge.

See ASSIGNMENT.

Of tax sales and of redemption thereof in city of Troy—publication.

See TAX, 5.

OFFICERS.

Proceeding against an officer of a municipality for enforcement of a right, not abated by resignation or removal of officer.

See MANDAMUS, 1, 2.

PARTIES.

Amendment—Changing Designation of Defendant from Representative to Individual Capacity Does Not Effect a Change of Parties—Statute of Limitations. The Supreme Court has power, under section 723 of the Code of Civil Procedure, to permit the amendment of the summons and complaint in an action of negligence by changing the designation of the defendant from trustee to that of an individual. The effect of the amendment is not tantamount to bringing in a new party, so as to enable it to plead the Statute of Limitations as a bar to its liability, more than three years having elapsed between the time of the accident and the date of the service of the amended summons and complaint, but merely changes the capacity in which the defendant is sought to be charged. *Boyd v. U. S. Mortgage & Trust Co.* 262

PARTITION.

See Adams v. Bristol (Mem.), 547.

PENAL CODE.

1. § 640d. — *Unconstitutional under Federal and State Constitutions* (U. S. Const. Art. 1, § 10, and 14th Amendment; N. Y. State Const. Art. 1, §§ 1 and 6). Section 640d of the Penal Code (L. 1901, ch. 128), which provides that "in cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, * * * shall be guilty of a misdemeanor," is an improper and unreasonable exercise of the police powers of the state, vested in the legislature, and violative of the Federal and State Constitutions (U. S. Const. art. 1, § 10, and 14th amendment; N. Y. State Const. art. 1, §§ 1 and 6), in that it is an arbitrary infringement upon the liberty and rights of all persons who engage in selling real estate for others, with or without compensation, by making the person employed and acting without written authority guilty of a misdemeanor and punishable as a criminal. *Fisher Co. v. Woods.* 90

PENALTIES.

Prohibition against fishing in certain waters — insufficient description of creek affected.

See FISH AND GAME, 1, 2.

PENSIONS.

Remedy of retired member of New York fire department aggrieved by action of commissioner in fixing pension is by direct proceeding, not by action.

See NEW YORK (CITY OF), 2.

PERJURY.

See *People v. Gilhcoley* (Mem.), 551.

PLEADING.

Amendment of.

See PARTIES.

Sufficiency of complaint in action to restrain waste on land acquired by Cornell University for a college of forestry.

See STATE, 1.

PRACTICE.

Court of Claims — Negligence — Failure to Move for Nonsuit at Close of Evidence Precludes Review of Questions of Law. Under the provisions of the Code of Civil Procedure relating to the Court of Claims (§ 263 *et seq.*) there is no reason why the practice therein should not be measured or judged by the same rules as prevail in the Supreme Court. Where, therefore, upon the trial, in the Court of Claims, of a claim against the state for injuries alleged to have been sustained by an employee thereof by reason of the negligence of a canal bridgetender, the counsel for the state failed to renew, at the close of all the evidence, a motion for a nonsuit, which was made and denied at the end of the evidence for the claimant, such failure will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the claim and case dismissed as a matter of law; so that a contention that the bridgetender, at the time he injured the claimant, was not acting within the scope of his employment so as to render the state liable for his misconduct and that, therefore, the claimant should have been nonsuited upon the trial, cannot be considered upon an appeal from a judgment of the Appellate Division affirming a judgment, granted by the Court of Claims, against the state and in favor of the claimant. *Spencer v. State of N. Y.* 484

Reference to take proofs unauthorized in proceeding for revocation of liquor tax certificate.

See EXCISE, 4.

Appointment of committee for insane life convict.

See INCOMPETENT PERSONS, 1.

Changing designation of defendant from representative to individual capacity does not effect a change of parties.

See PARTIES.

PRINCIPAL AND SURETY.

See *B. G. Ins. Co. v. Title Guaranty & Trust Co.* (Mem.), 545.

PUBLICATION.

Of list of registration and polling places in New York city.

See MANDAMUS, 3.

Of notices of tax sales and notices of redemption thereof in city of Troy.

See TAX, 5.

RAILROADS.

1. *Provisions of Railroad Law (Art. 4, § 101) with Respect to Five-cent Fare on Street Surface Railroads, Not Applicable Where Lines Leased Are Steam Surface or Elevated Roads.* Section 101 of article 4 of the Railroad Law (L. 1890, ch. 565 as amd.), requiring a street surface railroad to carry a passenger over its own line and any line leased by it within the limits of any incorporated city or village for a single fare, applies solely to street surface railroads; it does not apply where the line leased is an elevated or steam surface road having a charter right to charge a greater fare. A street surface railroad may lease another street surface railroad or a steam surface railroad or an elevated railroad (Art. 3, § 78); if it does, it must operate the leased line in accordance with the requirements of the charter thereof and is entitled to the benefits conferred thereby, including the authorized rate of fare. *People v. Bklyn. Heights R. R. Co.* 48

2. *Change of Motive Power on Leased Lines Does Not Affect Rate of Fare.* The fact that the lessee subsequently dispensed with steam as a motive power and substituted electricity on the leased lines does not affect the situation or change its rights so far as the question of fares is concerned. *Id.*

3. *Rate of Fare a Question for Legislative Determination.* Whether the elevated and steam surface railroads within a city should be placed upon the same basis with street surface railroads with reference to fares and the transfer of passengers is a question for the determination of the legislature and not for the courts. *Id.*

4. *Negligence of Railroad Conductor in Assisting Passenger to Alight from a Car at a Station.* While a railroad company is under no obligation to supply the aid of servants in assisting passengers to alight from cars at stations, yet where a conductor, as in this case, assumed to assist a passenger in so doing, and did it in such a negligent manner, by suddenly withdrawing his support, as to cause a fall, the company is liable for the resulting injury, since the passenger had the right to rely upon the conductor's careful performance of his undertaking. *Hanlon v. Central R. R. Co. of N. J.* 73

5. *Elevated Railroad—Ineffective Consent to Construction of Road.* A statement by an abutting owner, "I am in favor of an elevated road over the middle of the street but not on the walk," written by him upon a paper circulated on behalf of the railroad company amongst property owners, underneath a heading which, if subscribed without any qualifications or limitations, would have amounted to and constituted a general consent to the construction of the road, assuming that it was a consent to anything, cannot be construed as cutting off a claim for damages for the subsequent construction and operation of the road upon the sidewalk. *Shaw v. N. Y. El. R. R. Co.* 186

6. *Evidence of Company's Failure to Act upon Alleged Consent.* An application thereafter by the railroad company to the proper authorities for permission to construct a road, including such owner as among those refusing to consent to its construction, is evidence justifying a finding in an action for damages that the company did not act upon or accept the alleged consent. *Id.*

7. *Consent No Bar to Action for Damages by Subsequent Grantee Without Notice.* Assuming that the statement was a consent to the construction of the road, in the absence of evidence that it was recorded or notice thereof given to a subsequent grantee of the premises who took title before the commencement of the construction of the road, it would not bar his claim for damages. *Id.*

8. *Testimony of Deceased Witness Read on New Trial.* The evidence of a deceased witness given on the trial of an action for damages brought

RAILROADS—Continued.

against the original company, may be read on a new trial of the action against the lessee brought in as defendant. It is unnecessary to determine whether section 830 of the Code of Civil Procedure, as amended by chapter 352 of the Laws of 1899, limiting such evidence to a new trial between the same parties or "their legal representatives," would permit the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stands in the absence of an express or necessarily implied repeal. *Id.*

9. *When Error in Admission of Evidence as to Value Is Cured.* The admission of evidence of experts as to the value and rental value of an entire block as a basis for fixing the value and rental value of a separate piece therein, constitutes error, but is cured when on cross-examination they testify as to the separate values of the various lots constituting the entire parcel, so that it is possible for the trial court to apportion the evidence of aggregate value and apply the proper figures to the parcel in question. *Id.*

10. *Evidence of General Appreciation of Values in Other Localities.* Testimony as to what the value of property would have been if a railroad had not been built is inadmissible, but a witness may state that there had been a general appreciation in real estate values in other localities and that except for the construction of the road the same general course in values would have prevailed in the locality in question. *Id.*

11. *Injunction—Denial upon Ground of Great Public or Private Mischief—Time of Application Affects Character of Relief.* A court of equity is not bound to issue an injunction where it will produce a great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right; the time of the application therefor will also be considered, and affects largely the character of the relief which will be granted. *Knott v. Manhattan Ry. Co.* 243

12. *Elevated Railroad—Denial of Mandatory Injunction Compelling Removal of Track.* In an action commenced in 1902 by an abutting owner against an elevated railway company for a mandatory injunction compelling it to remove a track erected without legislative authority or municipal consent over and above the center of Ninth avenue in the city of New York, between two other tracks previously erected and operated by the defendant and its predecessors, in which the plaintiff asserted his absolute right to the removal of the track, it appeared that the defendant, in good faith and relying upon certain acts of the legislature thereafter held invalid, had in 1894 constructed the track; that the plaintiff had knowledge that it was being constructed, and ever since has been familiar with its use and effect; that the third track is a great public utility and benefit; that the injury suffered by the plaintiff, if any, is small compared with the injury and inconvenience to the defendant and public if the defendant is compelled to remove the same; that its removal would seriously impair the train service and increase the danger of operation; that the payment to the plaintiff of just compensation would be a remedy as adequate as would be the removal of the track. *Held*, that the trial court, in the exercise of its discretion, properly denied a mandatory injunction; that the award of a money judgment conditioned upon the conveyance by plaintiff to the defendant of the easements appropriated for the use of the track was proper; that although the defendant is in no situation to institute condemnation proceedings to acquire property rights, it may be regarded as a corporation acting in good faith and serving the public for a long series of years without interference, and hence is justified in acquiring easements by entering into contracts with abutting owners; that plaintiff having resorted to a court of equity must abide by the result or bring an action for damages in a court of law. *Id.*

See Senior v. N. Y. City Ry. Co. (Mem.), 559.

RAILROADS—Continued.

Action for assault upon passenger by employee—when allegations of complaint constitute cause of action for breach of contract of safe carriage.

See CARRIERS.

When railroad company sued for conversion of goods delivered to it for transportation may set up its ownership of the goods as a defense.

See CONVERSION.

Agreement between lessor and lessee railroad corporations compromising dispute as to which was entitled to saving in interest arising from refunding operations—when minority stockholders not entitled to maintain action to avoid.

See CORPORATIONS, 1-8.

REAL PROPERTY.

1. *When Title by Adverse Possession, Although Established by Parol Testimony, Is Marketable.* Title by adverse possession clearly established, although by parol evidence, is a marketable title; and where it appears in an action to compel specific performance of a contract to exchange real estate that the plaintiffs have a record title, perfect except as to two defects, which cannot be considered on this appeal, that they and their predecessors have had possession thereunder for a period of thirty-eight years and that during that entire period no person has made any claim of ownership to the premises, other than those from whom the plaintiffs derived their title, a decree, based upon a conclusion of law, that the plaintiffs have a good and indefeasible title to the premises by adverse possession, is properly granted. *Freedman v. Oppenheim.* 101

2. *Action to Restrain a Trespass—Insufficient Proof of Exclusive Ownership of Premises.* The facts examined in an action against one claiming to be the owner of an undivided half interest in the premises described in the complaint and his tenant, to restrain them from trespassing thereon, the plaintiff claiming to be the sole owner and entitled to the possession thereof, and held that there was sufficient evidence to support the findings of fact upon which was based a conclusion of law "that the plaintiff has failed to establish any exclusive right to the premises described in the complaint as against the defendants." *Country Club Land Assn. v. Lohbauer.* 106

3. *Remedy of Tenants in Common, a Partition Suit: of Owners in Severalty, Ejectment.* Assuming without deciding that the principal parties to the action were tenants in common, the plaintiff had no authority to interfere with defendants' tenant, its duty being to so exercise its rights as not to interfere with those of its co-tenant; if the plaintiff is a tenant in common, its remedy is a partition suit; if the owner in severalty, its remedy is ejectment. *Id.*

4. *Tax Title Paramount to Lien of Prior Mortgage—Owner Not a Proper Party in Foreclosure Action.* A title resting upon a sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage, and those in possession under such title are not proper parties in an action for the foreclosure of the mortgage, since they cannot be required to defend their title in an equitable action, but are entitled to have their rights passed upon by a jury in a court of law. *Erie Co. Sav. Bank v. Schuster.* 111

5. *Interest.* In an action to redeem real property and to have deeds and other conveyances under which defendant claimed title declared mortgages and for an accounting with respect to the use and occupation of the lands, the fact that the defendant went into possession wrongfully and as a mere trespasser, does not authorize the court to direct the computation of interest upon the yearly value of the use and occupation, upon the principle of annual rests, thus allowing compound interest. *Shelley v. Cody.* 166

REAL PROPERTY — Continued.

6. *Trespasser Not Entitled to Credit for Improvements.* The defendant being in possession as a trespasser, having wrongfully ousted and expelled the true owner, the court, in its discretion, has the power to deny him credit for any improvements he may have made upon the property. *Id.*

Offering for sale without written authority of owner — statute forbidding, unconstitutional.

See CONSTITUTIONAL LAW, 4.

Condemnation — objection by property owner — property or interest to be condemned must be actually described in petition — proceeding to acquire right to trim trees in order to protect telephone line.

See EMINENT DOMAIN, 1-3.

Assignment of rent accruing subsequent to extension of term of lease.

See LANDLORD AND TENANT.

Lease of land for term of years and renewals thereof — ownership of buildings on land at expiration of last term — when lessor not estopped from asserting title to buildings by extension of option to renew lease.

See LEASE, 1, 2.

Action against elevated railroad company to recover for damages to easements.

See RAILROADS, 5-10.

Action to compel removal of elevated railroad track in front of premises.

See RAILROADS, 11, 12.

When vendors of personal property, sold under conditional sale and attached to real estate owned by third party, may recover for the same from the owner of the real property.

See SALE, 1, 2.

When owner of animals lawfully driven along public highway liable for trespass of animals straying onto unfenced private lands.

See TRESPASS.

REFERENCE.

To take proofs in proceeding for revocation of liquor tax certificate unauthorized.

See EXCISE, 4.

REMAINDERS.

Contingent — equitable conversion.

See WILL, 1.

REPLEVIN.

See *John Hofman Co. v. Murphy* (Mem.), 548.

RES ADJUDICATA.

Conclusiveness of.

See DECEDENT'S ESTATE, 1, 2.

REVISED STATUTES.

1 R. S. 722, § 3; 723, § 28; 748, § 2 — *Will — Equitable Conversion — Contingent Remainder.* A testator directed his executor to invest \$1,500 in real estate for his niece, to be conveyed to her and held during her natural life, and after her death to the heirs of her body forever; the premises so to be purchased he gave, devised and bequeathed to the said niece during her natural life, and after her death "to the right heirs of her

REVISED STATUTES — Continued.

body forever;" the remainder of his estate he devised to his brother and his heirs forever; the testator died in 1885; the brother died intestate in 1892, leaving two sons, his only heirs at law; the niece died intestate in 1902 without issue, leaving a brother and sister her only heirs at law; at the time of her death the \$1,500 had not been invested as directed, but remained in the hands of a trustee appointed to succeed testator's executor. *Held*, that the testator having died before the enactment of the Real Property Law (L. 1896, ch. 547) the will must be interpreted according to the provisions of the Revised Statutes (1 R. S. 722, § 3; 725, § 28; 749, § 2); that the direction to invest operated as an equitable conversion of the fund into real property, and that it should be disposed of as if the investment had in fact been made; that the intent of the testator was to give his niece a life estate only in the real property to be purchased with said fund; that upon her death the title thereto vested in the heirs at law of testator's brothers and not in the heirs at law of testator's niece. *Webb v. Sweet.* 172

RIPARIAN RIGHTS.

See Thornton v. City of Auburn (Mem.), 549.

ROCHESTER (CITY OF).

1. *Tax — When City, in Action to Foreclose Tax Lien for Certain Tax, Cannot Recover Deficiency Judgment for Other Unpaid Taxes on Same Property.* In an action brought by the city of Rochester, under its charter (L. 1861, ch. 143, as am. by L. 1880, ch. 14, and L. 1897, ch. 784), to foreclose the equity of redemption in certain premises upon which a tax had been regularly assessed and the property duly sold for the non-payment of such tax, the city cannot, under an allegation in its complaint setting forth a general description of other taxes due from the taxpayer whose property was so sold, recover a deficiency judgment for the aggregate amount of such unpaid taxes, with interest, where there is no allegation that any steps had been taken to collect the same, and the charter contains, among its provisions for the sale of property for taxes and the redemption thereof, no provision which authorizes a judgment for a deficiency for uncollected taxes, where no steps have been taken, under the provisions of the charter, for the collection thereof. *City of Rochester v. Rochester Ry. Co.* 216

2. *Failure to Comply with Charter Provisions for Collection of Taxes — When Such Failure Not Cured by Statute (L. 1903, Ch. 522) and Judgment for Deficiency Authorized Thereby.* The city is not relieved from the necessity of complying with the provisions of its charter regulating the collection of taxes, as a condition precedent for a deficiency judgment for such unpaid taxes, by the curative statute relating to the collection of taxes (L. 1903, ch. 522), which provides, in substance, that all taxes heretofore spread upon the assessment rolls of such city may be collected either by action or by supplementary proceedings, or by foreclosure of tax liens, and that such remedies shall be in addition to the other methods provided in the charter for the collection of taxes, and not dependent upon them, or any of them, since such curative act, as heretofore construed and limited, does not authorize the foreclosure of all tax liens without compliance with the provisions of the charter, but merely validates certain taxes void for specified omissions in the method of assessing and levying the same, notwithstanding such omissions, and authorizes the foreclosure of such taxes upon that changed condition of affairs. *Id.*

SALE.

1. *Personal Property — Conditional Sale — When Vendors of Personal Property, Sold under Conditional Sale and Attached to Real Estate Owned by Third Party, May Recover for the Same.* The vendors of an engine under a conditional sale may recover in conversion for the amount unpaid on the same after default by their vendee, against a vendor under contract

SALE — Continued.

of real estate to which said engine has been attached by said vendee, who was also the vendee under and had made default upon the real estate contract, where the engine is so attached to the real estate that it can be detached and removed without serious damage or injury to the real estate and where the vendor of the latter has parted with no value and lost no rights on account of such engine, and, upon demand by the vendors of the engine, the vendor of the real estate has refused to let the former remove the engine from the premises. *Davis v. Bliss.* 77

2. *Damages — Effect of Section 116 of the Lien Law (L. 1897, Ch. 418) upon the Contract of Conditional Sale in Question.* Provisions in the contract of conditional sale, that the title of the engine should remain in the vendors until the purchase price should be paid in full, and that upon default in payment the vendors could retake the engine without process of law, all moneys paid to be considered as having been paid for the use or damage of the engine, must be considered as modified by section 116 of the Lien Law (L. 1897, ch. 418) which provides that personal property, retaken by a vendor under a contract of conditional sale, shall be retained for a period of thirty days, during which the vendee, or his successor in interest, may comply with the contract and thereupon receive the property, and if, at the expiration of such period, such terms are not complied with the vendor may cause the property to be sold at public auction; and where the vendors of such engine made a demand for the same upon the owner of the real estate, which was refused, and thereupon brought an action for the full value of the engine at that time, such vendors can only recover the amount remaining unpaid on the engine at the date of such conversion thereof; since, at that date they merely had the right to retake the engine, and for thirty days hold it subject to redemption by defendant, upon payment of the unpaid purchase price, and, to avoid circuity of action, defendant was entitled to defeat their claim for possession of the engine by paying or tendering the amount unpaid thereon. *Id.*

See Heilbronn v. Herzog (Mem.), 520; Hedstrom v. Harris (Mem.), 521; Heim v. Schwover (Mem.), 543.

Contract of — title to remain in vendor until payment — rights of vendor.

See MORTGAGE, 1, 2.

SERVICES.

See Buckbee v. Bd. of Education (Mem.), 544.

SESSION LAWS.

1848, *Ch. 37.* See par. 6, this title.

1860, *Ch. 236.* See par. 19, this title.

1. 1861, *Ch. 143 — Tax — Rochester (City of) — When City, in Action to Foreclose Tax Lien for Certain Tax, Cannot Recover Deficiency Judgment for Other Unpaid Taxes on Same Property.* In an action brought by the city of Rochester, under its charter (L. 1861, ch. 143, as amd. by L. 1880, ch. 14, and L. 1897, ch. 784), to foreclose the equity of redemption in certain premises upon which a tax had been regularly assessed and the property duly sold for the non-payment of such tax, the city cannot, under an allegation in its complaint setting forth a general description of other taxes due from the taxpayer whose property was so sold, recover a deficiency judgment for the aggregate amount of such unpaid taxes, with interest, where there is no allegation that any steps had been taken to collect the same. and the charter contains, among its provisions for the sale of property for taxes and the redemption thereof, no provision which authorizes a judgment for a deficiency for uncollected taxes, where no

SESSION LAWS—*Continued.*

steps have been taken, under the provisions of the charter, for the collection thereof. *City of Rochester v. Rochester Ry. Co.* 216

2. *Idem*—*Failure to Comply with Charter Provisions for Collection of Taxes*—*When Such Failure Not Cured by Statute and Judgment for Deficiency Authorized Thereby.* The city is not relieved from the necessity of complying with the provisions of its charter regulating the collection of taxes, as a condition precedent for a deficiency judgment for such unpaid taxes, by the curative statute relating to the collection of taxes (L. 1908, ch. 522), which provides, in substance, that all taxes heretofore spread upon the assessment rolls of such city may be collected either by action or by supplementary proceedings, or by foreclosure of tax liens, and that such remedies shall be in addition to the other methods provided in the charter for the collection of taxes, and not dependent upon them, or any of them, since such curative act, as heretofore construed and limited, does not authorize the foreclosure of all tax liens without compliance with the provisions of the charter, but merely validates certain taxes void for specified omissions in the method of assessing and levying the same, notwithstanding such omissions, and authorizes the foreclosure of such taxes upon that changed condition of affairs. *Id.*

8. 1866, Ch. 201—*Will—Bequest to Hospital under Erroneous Name—When Beneficiary Sufficiently Designated to Enable It to Take Gift.* Where a testator devised all of his real estate to his executors in trust to sell and dispose of the same and to divide the net proceeds of such sale and give "Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital," such provision is not invalid because there was at that time in the city of New York no hospital of that name, where it appears that there was a hospital building and grounds known to the public as St. Francis Hospital which was owned and conducted by a society incorporated under the name of "The Sisters of the Poor of St. Francis" for "the gratuitous care of the sick, aged, infirm and poor" under a statute (L. 1866, ch. 201) which further provided that "no misnomer of said corporation shall defeat any gift, grant or devise provided the intent shall sufficiently appear that any estate or interest was made to be vested in said corporation," and it is found as a fact by the trial court and conceded upon the argument of this appeal that the testator intended that his devise should be paid over to the trustees of that corporation. *Johnston v. Hughes.* 446

1879, Ch. 512. See par. 6, this title.

1880, Ch. 14. See par. 1, this title.

1885, Ch. 461. See par. 19, this title.

1887, Ch. 716. See par. 6, this title.

4. 1889, Ch. 401—*Insane—Appointment of Committee for Insane Life Convict.* Under the provisions of chapter 401 of the Laws of 1889 the Supreme Court has jurisdiction, upon the application of the persons mentioned therein, to entertain proceedings and direct the appointment of a committee of the estate of a life convict, although the convict before the commencement of the proceedings had become insane and had been transferred to a state hospital for insane convicts; the statute was intended to embrace all cases in which a judgment of life imprisonment had been pronounced, whether the convict should thereafter become insane or not and was not repealed by the enactment in 1895 of section 2823a of the Code of Civil Procedure, providing for the appointment of a committee upon the application of a state officer having special jurisdiction over the institution or by the superintendent thereof, "where an incompetent person has been committed to a state institution in any manner provided by

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law and is an inmate thereof." *Trust Co. of America v. State Safe Deposit Co.* 178

5. 1890, *Ch. 565*—*Railroad Law—Provisions of, with Respect to Five-cent Fare on Street Surface Railroads, Not Applicable Where Lines Leased Are Steam Surface or Elevated Roads.* Section 101 of article 4 of the Railroad Law (L. 1890, ch. 565, as amd.), requiring a street surface railroad to carry a passenger over its own line and any line leased by it within the limits of any incorporated city or village for a single fare, applies solely to street surface railroads; it does not apply where the line leased is an elevated or steam surface road having a charter right to charge a greater fare. A street surface railroad may lease another street surface railroad or a steam surface railroad or an elevated railroad (Art. 3, § 78); if it does, it must operate the leased line in accordance with the requirements of the charter thereof and is entitled to the benefits conferred thereby, including the authorized rate of fare. *People v. Brooklyn Heights R. R. Co.* 48

6. 1890, *Ch. 566*—*Transportation Corporations Law—New York City—Power to Grant Franchise for Electric Lighting Vested in Board of Aldermen, Not Board of Electrical Control, on October 30, 1896.* The power to grant to a corporation organized under the Transportation Corporations Law (L. 1890, ch. 566, § 61, embodying chapter 37 of the Laws of 1848 and chapter 512 of the Laws of 1879), a franchise to lay and construct suitable wires or other conductors in subways under streets, avenues, public parks and places in the city of New York for conducting and distributing electricity, was vested in the "municipal authorities," and on October 30, 1896, those authorities were the board of aldermen and not the board of electrical control, established by chapter 716 of the Laws of 1887, and conferring upon such board certain powers with respect to the occupation of the streets for electric lighting; that act neither expressly nor by implication conferred the power to grant such franchise; the purpose of the act was to regulate the exercise of rights after they had been acquired, not to create them; the power to create them was left precisely where it was before, in the "municipal authorities," i. e., the board of aldermen. *People ex rel. W. S. El. Co. v. Cons. Tel. & El. Subway Co.* 58

7. 1890, *Ch. 569*—*Town Law—Domestic Animals—Common-Law Rule of Liability of Owner of Animals for Trespasses Thereof—Exceptions to Rule—When Owner Liable for Trespasses of Animals Lawfully Driven Along Public Highway.* Under the common law every owner of domestic animals is liable for their trespasses upon the lands of others, whether such lands are inclosed or not, except in two instances: (1) A person lawfully driving domestic animals along a public highway, who exercises due care in so doing, is not liable for injuries which they do by escaping from his control upon lands abutting upon the highway, if the animals are pursued and promptly removed, since such casual trespassing, although wrongful, is an inevitable incident to the right to use the highway, and if the owner of lands adjoining a highway leaves the same wholly unfenced, he thereby adds to the possibility of such casual trespass; and (2) where the owner of lands, choosing to let them lie open, shall serve upon the owners of adjoining lands written notice to that effect, the owners thereof shall not be liable for damages done by animals lawfully upon their premises going upon the lands so lying open or upon any other lands of the owner thereof through such lands so lying open (The Town Law, L. 1890, ch. 569, § 100 [as amd. by L. 1892, ch. 93] and § 101); but when cattle, being driven along a public highway, cross unfenced lands abutting upon the highway and trespass upon other unfenced lands adjacent thereto, but not abutting on the highway, the owner of such animals is liable for the damages caused thereby, notwithstanding there was no fence between such lands and the lands lying between them and the highway, since the owner of the lands so trespassed upon did not, by leaving his lands

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unfenced, take the chances, without the right of recovery, for trespasses by cattle wrongfully upon the lands adjoining the highway and between the highway and his lands. *Wood v. Snider.* 28

1892, *Ch.* 92. See par. 7, this title.

1892, *Ch.* 512. See par. 19, this title.

8. 1896, *Ch.* 112 — *Liquor Tax Law* — *Special Agents of State Excise Commissioner* — *When Acting in Discharge of Their Duties They Are Public Detectives* — *How Their Testimony as Witnesses for the State Should Be Considered.* The special agents appointed by the state commissioner of excise under section 10 of the Liquor Tax Law (L. 1896, ch. 112, as amd. by L. 1907, ch. 812, and L. 1903, ch. 486) for the purpose of investigating matters connected with the sale of liquors, and in cases of criminal violations of the statute to make verified complaints thereof, are detectives, but public and official detectives as distinguished from private detectives; they are public officers engaged in the performance of duties prescribed by statute, and should not be treated by the courts or juries as private detectives, or with the suspicion that is associated with mere spotters, paid informers, and those that are given compensation dependent upon certain results being obtained; neither should the relation of special agents to the case in which they are witnesses be wholly withdrawn from the consideration of the jury. *Cullinan v. Furthman.* 160

See, also, par. 27, this title.

9. 1896, *Ch.* 272 — *Domestic Relations Law* — *Will* — *When Testamentary Appointment of Guardians Is Void* — *When Directions to Appointees as to Custody of Funds Constitute a Valid Power in Trust.* While a testamentary appointment of guardians for a testator's minor children, to whom he bequeathed his estate, is void under the Domestic Relations Law (L. 1896, ch. 272) because it excluded the mother, who survived him, a direction that "all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as such guardians" is effective. The testator could not say who should have the custody and control of the property of his infant children generally, but he had entire power to say who should have the custody and control during their respective minorities of that part of his property that he chose to give to them. He could leave the title in the minors and create a power in trust for the control and management of the fund, and such direction must be regarded as creating a valid power in trust. *Matter of Kellogg.* 355

See par. 12, this title.

10. 1896, *Ch.* 547 — *Real Property Law* — *Will* — *Equitable Conversion* — *Contingent Remainder.* A testator directed his executor to invest \$1,500 in real estate for his niece, to be conveyed to her and held during her natural life, and after her death to the heirs of her body forever; the premises so to be purchased he gave, devised and bequeathed to the said niece during her natural life, and after her death "to the right heirs of her body forever;" the remainder of his estate he devised to his brother and his heirs forever; the testator died in 1885; the brother died intestate in 1892, leaving two sons, his only heirs at law; the niece died intestate in 1902 without issue, leaving a brother and sister her only heirs at law; at the time of her death the \$1,500 had not been invested as directed, but remained in the hands of a trustee appointed to succeed testator's executor. Held, that the testator having died before the enactment of the Real Property Law (L. 1896, ch. 547) the will must be interpreted according to the provisions of the Revised Statutes (1 R. S. 722, § 3; 725, § 28; 748, § 2); that the direction to invest operated as an equitable conversion of the fund into real property, and that it should be disposed of as if the investment had in fact been made; that the intent of the testator was to give his niece a life estate only in the real property to be purchased with said

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fund; that upon her death the title thereto vested in the heirs at law of testator's brothers and not in the heirs at law of testator's niece. *Webb v. Sweet.* 172

11. 1896, Ch. 908, *Tax Law—Transfer Tax.* Legacies to nephews and nieces, assigned by them to testator's widow for a valuable consideration and in settlement of a contest of the will instituted by her, pass, not under the will, but by virtue of the assignment; the widow takes them as assignee, not as legatee; they are taxable, therefore, under the Transfer Tax Act (L. 1896, ch. 908, §§ 220-242) at the rate of five per cent, as in the case of a bequest to nephews and nieces; not at the rate of one per cent, as in the case of a bequest to a widow. *Matter of Cook.* 253

12. *Legacy to Child of Adopted Daughter.* A legacy to the son of an adopted daughter is taxable at the same rate as if his mother had been the natural child of the testator, i. e., one per cent; since the Domestic Relations Law, relating to the effect of the adoption of children (L. 1896, ch. 272, § 64), gives to an adopted child the same legal relation to the foster parent as a child of his body, and that relation extends to the heirs and next of kin of the child by adoption the same as to those of a child by nature. *Id.*

13. *Idem—Construction of Phrase "Lineal Descendant"—Tax Law.* The fact that the statute dealing with exemptions from the succession tax (Tax Law [L. 1896, ch. 908], § 221), while it exempts adopted children to the same extent as natural children, does not mention their heirs and next of kin, and, in describing the exempt class, makes use of the phrase "or any lineal descendant of such decedent," does not deprive the heirs and next of kin of adopted children of the benefit of the exemption, since the words "lineal descendant" must be read in connection with the statute governing the effect of adoption, which makes the child by adoption and his heirs the same in every respect, affecting inheritance or succession, as an actual child and his heirs. In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature. The legislature created the relation and extended to it the right of inheritance, not only as between the foster parent and the adopted child, but also as between the children of the adopted child and the foster parent. *Id.*

See, also, par. 19, this title.

See, also, pars. 28, 29, 30, this title.

14. 1896, Ch. 909—*Election Law—Borough of Manhattan—Publication of List of Registration and Polling Places in Party Newspapers—Test Prescribed by Statute in the Selection and Appointment of Such Newspapers.* The Election Law (L. 1896, ch. 909, § 10, as amd. by L. 1906, ch. 259), which provides that, in the borough of Manhattan, the board of elections shall publish a list of the registration and polling places in such borough in four newspapers advocating the principles of the party polling the highest number of votes at the last preceding election for governor, and also in four other newspapers advocating the principles of the political party polling the next highest number of votes, prescribes no test, in the selection and appointment of newspapers to publish the list, except that they shall advocate the principles of such parties; the courts have no power, therefore, to grant a peremptory writ of mandamus requiring the board of elections to publish the list in four newspapers which support the candidates nominated, and the platform adopted, at a certain convention held by one of the parties designated in the statute; and an order of the Appellate Division reversing an order of the Special Term granting such a writ, and directing that a mandamus issue requiring the board to

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publish the list in four newspapers which advocate the principles of such party, is correct and should be affirmed. *People ex rel. Quinn v. Voorhis.*

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1897, *Ch.* 312. See par. 8, this title.

15. 1897, *Ch.* 418 — *Lien Law* — *Effect of Section 116 upon a Contract of Conditional Sale.* Provisions in a contract of conditional sale of an engine that the title should remain in the vendors until the purchase price should be paid in full, and that upon default in payment the vendors could retake the engine without process of law, all moneys paid to be considered as having been paid for the use or damage of the engine, must be considered as modified by section 116 of the Lien Law (L. 1897, ch. 418) which provides that personal property, retaken by a vendor under a contract of conditional sale, shall be retained for a period of thirty days, during which the vendee, or his successor in interest, may comply with the contract and thereupon receive the property, and if, at the expiration of such period, such terms are not complied with the vendor may cause the property to be sold at public auction; and where the vendors of such engine made a demand for the same upon the owner of the real estate, which was refused, and thereupon brought an action for the full value of the engine at that time, such vendors can only recover the amount remaining unpaid on the engine at the date of such conversion thereof; since, at that date they merely had the right to retake the engine, and for thirty days hold it subject to redemption by defendant, upon payment of the unpaid purchase price, and, to avoid circuity of action, defendant was entitled to defeat their claim for possession of the engine by paying or tendering the amount unpaid thereon. *Davis v. Bliss.*

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1897, *Ch.* 784. See par. 1, this title.

16. 1898, *Ch.* 122 — *Forest Preserve* — *Sufficiency of Complaint in Action to Restrain Waste of Lands Acquired by Cornell University for a College of Forestry.* In an action by the state against a private corporation and Cornell University to enjoin a waste of lands acquired by such university under and subject to the provisions of chapter 122 of the Laws of 1898, which authorized the university to establish a department of forestry and provided for the purchase of lands for that purpose by the state, title to be taken by the university and held by it for thirty years, at the expiration of which period the lands should be conveyed to the state as part of the forest preserve, the complaint alleged in effect that the university acquired the lands in question, the purchase price therefor being paid by the state; that thereafter the university entered into a contract with the corporation for a term of years whereby the latter agreed to manufacture lumber cut on said lands by the university, to be furnished "as the company may give written notice that it shall require to be cut during the next following season;" that the university had thereafter abandoned its department of forestry, but that both parties continue and threaten to continue the performance of such contract, which will denude the lands of their forests, to the irreparable damage of the plaintiff, the relief demanded being that the validity of such statute and contract be determined, that an injunction issue restraining the defendants from cutting any timber upon such lands or removing any therefrom, and that the plaintiff be adjudged the equitable owner thereof, and as such entitled to the possession of the same. *Held*, that the complaint stated a cause of action. *People v. Brooklyn Cooperage Co.*

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17. *Idem.* — *Constitutional Law* — *Act Not Violative of Forest Preserve Section of the Constitution.* A contention that the act is violative of section 7 of article 7 of the Constitution providing that "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.

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They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed," is without force, for the reason that the state has never been vested with the legal title and, therefore, the provision cited has no application. *Id.*

18. *Idem.* — *Act Not Violative of Constitutional Prohibition Against Giving or Lending Money or Credit of the State.* Nor is the act violative of section 9 of article 8 of the Constitution prohibiting the giving or loaning of the credit or money of the state, etc.; since it is a public statute, the sole object of which is to promote education in the art of forestry, providing a perfect scheme of state control, and constituting the university, which is a non-sectarian educational institution, a subordinate governmental agency which undertakes to render services to the state in consideration of appropriations made. *Id.*

19. 1898, *Ch.* 182 — *Second Class Cities Charter — Tax — Publication of Notices of Tax Sales and Notices of Redemption Thereof in City of Troy and County of Rensselaer — Local Statutes Regulating Publication Repealed by Implication by Act for Government of Cities of Second Class and General Tax Law.* By the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch. 581) pertaining to the sale of lands for unpaid taxes and the redemption thereof within cities of the second class, and by the provisions of the Tax Law (L. 1896, ch. 908) pertaining to the sale and redemption of lands in a county, outside of any cities situated therein, there is provided a complete and harmonious system and method of procedure, which supersedes and by implication repeals the special statutes (L. 1860, ch. 236; L. 1885, ch. 461, as amd. by L. 1892, ch. 512) requiring the publication of notices of tax sales, and notices of redemption from tax sales, of lands within the city of Troy, a city of the second class, and lands within the county of Rensselaer, to be published in newspapers, published in the city of Troy and in other places in the county of Rensselaer, annually designated by the board of supervisors at the fall session thereof; so that such notices relating to lands within the city of Troy must now be published, under the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch. 581, §§ 29 and 313), in newspapers published in said city and designated as the official newspapers thereof by the common council, at its first meeting after the election of its members; and such notices relating to lands in the county of Rensselaer, outside the city of Troy, must be published, under the provisions of the Tax Law (L. 1896, ch. 908, §§ 151, 180), in the newspapers designated for the publication of the Session Laws. *Matter of Troy Press Co.* 279

20. 1899, *Ch.* 352 — *Testimony of Deceased Witness Read on New Trial.* The evidence of a deceased witness given on the trial of an action brought against an elevated railroad company for damages to abutting property may be read on a new trial of the action against a lessee brought in as defendant. It is unnecessary to determine whether section 890 of the Code of Civil Procedure, as amended by chapter 352 of the Laws of 1899, limiting such evidence to a new trial between the same parties or "their legal representatives," would permit the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stands in the absence of an express or necessarily implied repeal. *Shaw v. N. Y. El. R. R. Co.* 186

1899, *Ch.* 581. See par. 19, this title.

21. 1900, *Ch.* 20 — *Forest, Fish and Game Law — Prohibition against Fishing in Certain Waters — Provision of Section 156 as to Filing of Regulation Mandatory.* That provision of section 156 of the Forest, Fish and Game Law (L. 1900, ch. 20; L. 1901, chs. 94, 662) requiring a copy of a regu-

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lation prohibiting fishing in certain waters to be "filed in the office of the clerk of the town to which the prohibition or regulation applies," is mandatory, rather than directory, not simply on account of the form of the command, but also because the object is to furnish an official record near at hand for convenient examination by those who wish to know whether fishing in a given stream has been prohibited by a local regulation; and the requirement must be strictly complied with. *People v. Worden*. 322

1901, *Ch.* 94. See par. 21, this title.

22. 1901, *Ch.* 128—*Unconstitutional under Federal and State Constitutions* (U. S. Const. Art. 1, § 10, and 14th Amendment; N. Y. State Const. Art. 1, §§ 1 and 6). Section 640d of the Penal Code (L. 1901, ch. 128), which provides that "in cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, * * * shall be guilty of a misdemeanor," is an improper and unreasonable exercise of the police powers of the state, vested in the legislature, and violative of the Federal and State Constitutions (U. S. Const. art. 1, § 10, and 14th amendment; N. Y. State Const. art. 1, §§ 1 and 6), in that it is an arbitrary infringement upon the liberty and rights of all persons who engage in selling real estate for others, with or without compensation, by making the person employed and acting without written authority guilty of a misdemeanor and punishable as a criminal. *Fisher Co. v. Woods*. 90

28. 1901, *Ch.* 466—*New York City Charter—Mandamus—Proceeding Against an Officer of a Municipality for Enforcement of a Right, Not Abated by Resignation or Removal of Officer*. Where an assistant engineer in the department of bridges in the city of New York, appointed after passing the civil service examinations, who was suspended without pay by the commissioner of bridges, upon the ground that his services were no longer necessary, under section 1543 of the charter of the city of New York (L. 1901, ch. 466), procured an alternative writ of mandamus to compel his reinstatement, which, after a trial of the issues involved, was decided in his favor, and then moved the court for a final order granting a peremptory writ, the hearing of which motion was postponed from time to time for a period of about two months, when the case was orally argued and time given for counsel to submit written briefs, during which time the commissioner of bridges resigned, and thereupon, and before any decision of the motion for a peremptory writ was made, the corporation counsel of the city, upon affidavits showing the resignation of the defendant, moved for an order declaring the proceeding abated, it is reversible error for the Special Term to quash, supersede and set aside the writ upon the ground that the proceeding had abated. The successor of such commissioner should have been substituted and the proceeding continued against him as the defendant therein. *People ex rel. La Chicotte v. Best*. 1

24. *Idem*—*New York Fire Department—Remedy of Retired Member Aggrieved by Action of Commissioner in Fixing Pension Is by Direct Proceeding Not by Action—Burden of Proof*. A recovery in an action by a retired fireman of the city of New York to recover arrears claimed to be due on his pension by reason of an alleged unlawful determination of the fire commissioner as to its amount (L. 1901, ch. 466, § 790), even if the action were maintainable, could not be sustained, where the plaintiff fails to meet the burden imposed upon him of proving that the commissioner had violated his duty in fixing the amount of the pension; such action, however, is not maintainable; the remedy of any member of the department aggrieved by the action of the commissioner in determining his pension is to correct that determination by a direct proceeding, such as mandamus, not by action. *Ramsay v. Hayes*. 367

1901, *Ch.* 662. See par. 21, this title.

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25. 1902—*Ch. 572—Middleton Charter—Constitutional Law—Requirement in Charter as to Written Notice of Existence of Snow or Ice on Sidewalks Constitutional.* A provision in a municipal charter (L. 1902, ch. 572) relieving the city from liability for injuries resulting from an accumulation of snow and ice on a sidewalk unless written notice of such accumulation is actually given to the common council, and there is a failure within a reasonable time to cause its removal, is constitutional and valid, is an essential part of a cause of action against the city for such injuries, and compliance with its requirement as to giving the written notice specified must be alleged and proved. *MacMullen v. City of Middleton.*

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26. 1902, *Ch. 600—Employers' Liability Act—When Employee Is Not a Superintendent Within Meaning of Act—Master Not Liable for Injuries Caused to Servant by Negligence or Error in Judgment of Co-servant.* Where it appears, in an action brought to recover for the death of plaintiff's intestate caused by the breaking of a defective ladder negligently selected for decedent to work upon by an alleged superintendent of the defendant, that the decedent was in the service of the defendant as a helper to a steamfitter, or plumber, also working for the defendant; that the latter was employed by the defendant solely as a steamfitter, or plumber, and had been occupied as such during the entire time that he had been in the defendant's service; that the steamfitter had no power to hire or discharge the helper, who was employed by the defendant and directed to serve as a helper to the steamfitter; that they worked together as laborers, doing the same class of work, one as the mechanic, fitting or repairing steam pipes, the other assisting him in that work, the relation between them was merely that of co-employees; and, notwithstanding the fact that it was the helper's duty to obey the directions of the steamfitter with reference to their work, the steamfitter did not occupy the position of, and had never been intrusted with, the powers of a superintendent within the meaning of the Employers' Liability Act (L. 1902, ch. 600). The defendant is not liable, therefore, for the negligence, or error in judgment, of the steamfitter in selecting, for the helper to work upon, an old and defective ladder, which broke and caused the helper to fall, whereby he received injuries from which he died, when there were numerous other ladders upon the premises from which a safe and suitable ladder could have been selected. *McConnell v. Morse I. W. & D. D. Co.*

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1903, *Ch. 486.* See par. 8, this title.

1903, *Ch. 522.* See par. 2, this title.

1905, *Ch. 241.* See pars. 28, 29, 30, this title.

27. 1905, *Ch. 680—Liquor Tax Law—Proceedings for Revocation of Certificate—Reference to Take Proofs Unauthorized.* Upon the return of a petition and order to show cause in a proceeding for the revocation of a liquor tax certificate, instituted under subdivision 2 of section 28 of the Liquor Tax Law (L. 1896, ch. 112, as amd. L. 1905, ch. 680), where the answer to the petition has been filed, the Supreme Court at Special Term has no power to refer the matter to a referee to take the proofs and report the testimony to the court for its hearing and final determination. The power to refer having been omitted from the amendatory statute of 1905, the legislature must be assumed to have intended to change the practice in this regard. *Matter of Clement v. Hegeman & Co.*

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1906, *Ch. 259.* See par. 14, this title.

28. 1906, *Ch. 414—Stock Transfer Tax Act Invalid as an Arbitrary Discrimination in Favor of One as Against Another of the Same Class.* Section 1 of chapter 414 of the Laws of 1906, which purported to amend the Stock Transfer Tax Act (section 315 of the Tax Law, as amended by chapter 241 of the Laws of 1905), and imposes a tax of two cents "on

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each share of one hundred dollars of face value or fraction thereof," instead of "on each hundred dollars of face value or fraction thereof," as provided by the act of 1905, taxes the sale of all shares of the face value of one hundred dollars and also all shares of the face value of any fraction of one hundred dollars; the tax is measured by the number of shares regardless of face value, instead of by the face value of the shares sold, i. e., the sale of one hundred shares of the face value of ten dollars is taxed two dollars, while the sale of ten shares of the face value of one hundred dollars is taxed twenty cents, the shares sold in each case being worth the same amount. All corporate shares are placed in a class, but all members of the class are not treated alike; without method or order or reason the statute bears heavily upon some and lightly upon others in the same situation. This is not classification, but arbitrary or accidental selection. While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. The taxing clause of the act of 1906 must be regarded as an arbitrary discrimination in favor of one as against another of the same class, is a violation of primary rights, and as such it is unconstitutional and void. *People ex rel. Farrington v. Menesching.* 8

29. *Idem* — *Stock Transfer Tax Act (Tax Law, § 815; Amd. by L. 1905, Ch. 241) Not Affected by Unconstitutionality of Act of 1906.* A contention that although the amendment is void, it may be regarded as valid for the purpose of substitution or repeal cannot be sustained. A valid statute cannot be annulled by a void amendment. A statute is never repealed by implication when a provision of a later act which would otherwise effect a repeal is unconstitutional and void. The taxing clause of the act of 1906 being unconstitutional, the taxing clause of the act of 1905, which it purported to amend, was not repealed, modified or in any way affected.

Id.

80. *Idem* — *Validity of Warrant of Arrest Charging Violation of Statute.* A warrant of arrest charging the relator in habeas corpus proceedings with his failure to affix any stamp or pay any tax upon a sale of stock certificates by him, "in violation of chapter 241 of the Laws of 1905, as amended by chapter 414 of the Laws of 1906," is valid, although it recites the void statute, where the relator attacks the latter as void, and he is presumed to have known that, if void, the former statute must be operative, and hence he could not be misled. Especially is this true in this case, since the act of 1906 was not altogether void. Section 2 thereof amended section 317 of the act of 1905, relating to the penalty for a failure to pay the tax, and the warrant does not refer to the section violated, but to that part of the act which was valid.

Id.

STATE.

1. *Sufficiency of Complaint in Action to Restrain Waste on Lands Acquired by Cornell University for a College of Forestry, under Chapter 122, Laws of 1898.* In an action by the state against a private corporation and Cornell University to enjoin a waste of lands acquired by such university under and subject to the provisions of chapter 122 of the Laws of 1898, which authorized the university to establish a department of forestry and provided for the purchase of lands for that purpose by the state, title to be taken by the university and held by it for thirty years, at the expiration of which period the lands should be conveyed to the state as part of the forest preserve, the complaint alleged in effect that the university acquired the lands in question, the purchase price therefor being paid by the state; that thereafter the university entered into a contract with the corporation for a term of years whereby the latter agreed to manufacture lumber cut on said lands by the university, to be furnished "as the company may give written notice that it shall require to be cut during the next following season;" that the university had thereafter abandoned its

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department of forestry, but that both parties continue and threaten to continue the performance of such contract, which will denude the lands of their forests, to the irreparable damage of the plaintiff, the relief demanded being that the validity of such statute and contract be determined, that an injunction issue restraining the defendant from cutting any timber upon such lands or removing any therefrom, and that the plaintiff be adjudged the equitable owner thereof, and as such entitled to the possession of the same. *Held*, that the complaint stated a cause of action. *People v. Brooklyn Cooperage Co.* 143

2. *Constitutional Law* — *Act Not Violative of Forest Preserve Section of the Constitution.* A contention that the act is violative of section 7 of article 7 of the Constitution providing that "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed," is without force, for the reason that the state has never been vested with the legal title and, therefore, the provision cited has no application. *Id.*

3. *Act Not Violative of Constitutional Prohibition against Giving or Lending Money or Credit of the State.* Nor is the act violative of section 9 of article 8 of the Constitution prohibiting the giving or loaning of the credit or money of the state, etc.; since it is a public statute, the sold object of which is to promote education in the art of forestry, providing a perfect scheme of state control, and constituting the university, which is a non-sectarian educational institution, a subordinate governmental agency which undertakes to render services to the state in consideration of appropriations made. *Id.*

See Adkinson v. State of New York (Mem.), 566.

Negligence — claim against state for injuries.

See PRACTICE.

STATUTES.

Practical Construction. The doctrine of practical construction has no application to statutes free from ambiguity or not subject to any reasonable doubt as to their meaning. *People ex rel. W. S. El. Co. v. C. T. & E. S. Co.* 58

Chapter 414 of Laws of 1906, amending Stock Transfer Tax Act, unconstitutional.

See CONSTITUTIONAL LAW, 1-3.

Chapter 128 of Laws of 1901, forbidding offer for sale of real property without written consent of owner, unconstitutional.

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STOCKHOLDERS.

When minority stockholders not entitled to maintain action to avoid agreement between lessor and lessee railroad corporations compromising dispute as to which was entitled to saving in interest arising from refunding operations.

See CORPORATIONS, 1-8.

STOCK TRANSFER TAX.

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STORES.

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STREAMS AND WATERCOURSES.

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See FISH AND GAME, 1, 2.

STREET RAILROADS.

Rates of fare.

See RAILROADS, 1-3.

STREETS.

See *Matter of Hamilton St.* (Mem.), 542.

Right of action against city for negligence in care of streets purely statutory — requirement of written notice of existence of snow or ice.

See MUNICIPAL CORPORATIONS, 1, 2.

TAX.

1. *Transfer Tax — Rate Not Affected by Assignment of Legacy.* A succession tax is measured by the legal relation which the legatee bears to the testator, and is not affected by the relation which an assignee of the legatee bears to him. *Matter of Cook.* 253

2. *Same.* Legacies to nephews and nieces, assigned by them to testator's widow for a valuable consideration and in settlement of a contest of the will instituted by her, pass, not under the will, but by virtue of the assignment; the widow takes them as assignee, not as legatee; they are taxable, therefore, under the Transfer Tax Act (L. 1896, ch. 908, §§ 220-242) at the rate of five per cent, as in the case of a bequest to nephews and nieces; not at the rate of one per cent, as in the case of a bequest to a widow. *Id.*

3. *Legacy to Child of Adopted Daughter.* A legacy to the son of an adopted daughter is taxable at the same rate as if his mother had been the natural child of the testator, i. e., one per cent; since the Domestic Relations Law, relating to the effect of the adoption of children (L. 1896, ch. 272, § 64), gives to an adopted child the same legal relation to the foster parent as a child of his body, and that relation extends to the heirs and next of kin of the child by adoption the same as to those of a child by nature. *Id.*

4. *Construction of Phrase "Lineal Descendant" — Tax Law* (L. 1896, Ch. 908), § 221. The fact that the statute dealing with exemptions from the succession tax (Tax Law [L. 1896, ch. 908], § 221), while it exempts adopted children to the same extent as natural children, does not mention their heirs and next of kin, and, in describing the exempt class, makes use of the phrase "or any lineal descendant of such decedent," does not deprive the heirs and next of kin of adopted children of the benefit of the exemption, since the words "lineal descendant" must be read in connection with the statute governing the effect of adoption, which makes the child by adoption and his heirs the same in every respect, affecting inheritance or succession, as an actual child and his heirs. In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature. The legislature created the relation and extended to it the right of inheritance, not only as between the foster parent and the adopted child, but also as between the children of the adopted child and the foster parent. *Id.*

5. *Publication of Notices of Tax Sales and Notices of Redemption Thereof in City of Troy and County of Rensselaer — Local Statutes Regulating Publication Repealed by Implication by Act for Government of Cities of Second Class and General Tax Law.* By the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch.

TAX— *Continued.*

581) pertaining to the sale of lands for unpaid taxes and the redemption thereof within cities of the second class, and by the provisions of the Tax Law (L. 1896, ch. 908) pertaining to the sale and redemption of lands in a county, outside of any city situated therein, there is provided a complete and harmonious system and method of procedure, which supersedes and by implication repeals the special statutes. (L. 1860, ch. 236; L. 1885, ch. 461, as amd. by L. 1892, ch. 512) requiring the publication of notices of tax sales, and notices of redemption from tax sales, of lands within the city of Troy, a city of the second class, and lands within the county of Rensselaer, to be published in newspapers, published in the city of Troy and in other places in the county of Rensselaer, annually designated by the board of supervisors at the fall session thereof; so that such notices relating to lands within the city of Troy must now be published, under the provisions of the act for the government of cities of the second class (L. 1898, ch. 182, as amd. by L. 1899, ch. 581, §§ 29 and 313), in newspapers published in said city and designated as the official newspapers thereof by the common council, at its first meeting after the election of its members; and such notices relating to lands in the county of Rensselaer, outside the city of Troy, must be published, under the provisions of the Tax Law (L. 1896, ch. 908, §§ 151, 130), in the newspapers designated for the publication of the Session Laws. *Matter of Troy Press Co.* 279

See People ex rel. Litchfield v. O'Donnel (Mem.), 536; *People ex rel. Litchfield v. Wells* (Mem.), 536; *Puddell v. City of New York* (Mem.), 552.

Stock Transfer Tax Act—amendatory act invalid—original act not affected thereby—validity of warrant of arrest charging violation of statute.

See CONSTITUTIONAL LAW, 1-3.

When city in action to foreclose tax lien cannot recover deficiency judgment for other unpaid taxes.

See ROCHESTER (CITY OF), 1, 2.

TAXPAYER'S ACTION.

See McNally v. Mansfield (Mem.), 522.

TELEPHONE COMPANIES.

Proceeding to acquire right to trim trees in order to protect line from interference.

See EMINENT DOMAIN, 3.

TITLE.

See Clark v. Durand (Mem.), 560.

To buildings on leased land.

See LEASE, 1, 2.

By adverse possession—when marketable although established by parol testimony.

See REAL PROPERTY, 1.

Tax title paramount to lien of prior mortgage.

See REAL PROPERTY, 4.

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See People ex rel. Rundall v. Goodino (Mem.), 538; *People ex rel. United Construction Co. v. Voorhies* (Mem.), 539.

Prohibition against fishing in certain waters—insufficient description of creek affected.

See FISH AND GAME, 1, 2.

TRANSFER TAX.

See Matter of Hess (Mem.), 554.

Rate not affected by assignment of legacy — legacy to a child of adopted daughter — construction of phrase "Lineal descendant."

See TAX, 1-4.

TRESPASS.

Domestic Animals — Common-law Rule of Liability of Owner of Animals for Trespasses Thereof — Exceptions to Rule — When Owner Liable for Trespasses of Animals Lawfully Driven Along Public Highway. Under the common law every owner of domestic animals is liable for their trespasses upon the lands of others, whether such lands are inclosed or not, except in two instances: (1) A person lawfully driving domestic animals along a public highway, who exercises due care in so doing, is not liable for injuries which they do by escaping from his control upon lands abutting upon the highway, if the animals are pursued and promptly removed, since such casual trespassing, although wrongful, is an inevitable incident to the right to use the highway, and if the owner of lands adjoining a highway leaves the same wholly unfenced, he thereby adds to the possibility of such casual trespass; and (2) where the owner of lands, choosing to let them lie open, shall serve upon the owners of adjoining lands written notice to that effect, the owners thereof shall not be liable for damages done by animals lawfully upon their premises, going upon the lands so lying open or upon any other lands of the owner thereof through such lands so lying open (The Town Law, L. 1890, ch. 569, § 100 [as amd. by L. 1892, ch. 92] and § 101); but when cattle, being driven along a public highway, cross unfenced lands abutting upon the highway and trespass upon other unfenced lands adjacent thereto, but not abutting on the highway, the owner of such animals is liable for the damages caused thereby, notwithstanding there was no fence between such lands and the lands lying between them and the highway, since the owner of the lands so trespassed upon did not, by leaving his lands unfenced, take the chances, without the right of recovery, for trespasses by cattle wrongfully upon the lands adjoining the highway and between the highway and his lands. *Wood v. Snider.* 28

See Racquette Falls Land Co. v. Hoyt (Mem.), 550.

Action to restrain — insufficient proof of exclusive ownership of premises — remedy.

See REAL PROPERTY, 2, 3.

Interest on action for accounting for use and occupation of land — trespasser not entitled to credit for improvements.

See REAL PROPERTY, 5, 6.

TRIAL

For murder — where erroneous instruction as to degree is harmless.

See CRIMES, 1.

For murder — insanity — sufficiency of evidence — admissibility of statements made by defendant to medical expert who examined him during the trial — defendant's statements as to transactions prior to time of trial admissible on behalf of people.

See CRIMES, 2-4.

For murder — circumstantial evidence — cross-examination by prosecution of its own witness.

See CRIMES, 8, 9.

When defendant in action to recover moneys alleged to have been obtained from decedent by fraud may testify as to personal transactions.

See EVIDENCE, 1, 2.

TRIAL — *Continued.*

How testimony of special agents of state excise commissioners should be considered — erroneous charge as to weight to be given to testimony of such special agents — erroneous charge as to duties of special agents based upon facts not established by evidence.

See EXCISE, 1-3.

Evidence — impeachment of witness — evidence of repairs to machine after accident incompetent — evidence that witness was nearly injured by the machine which injured plaintiff incompetent — impropriety of remarks of counsel as to defendant's insurance against liability.

See NEGLIGENCE, 2-5.

Erroneous nonsuit in action for negligence.

See NEGLIGENCE, 10.

Insufficient proof of negligence.

See NEGLIGENCE, 11, 12.

In Court of Claims — failure to move for nonsuit at close of evidence precludes review of questions of law.

See PRACTICE.

Of action against elevated railroad for damages to easements — evidence — when error in admission of evidence as to value is cured.

See RAILROADS, 6-10.

TROY (CITY OF).

Publication of notices of tax sales and notices of redemption thereof in city of Troy.

See TAX, 5.

TRUST COMPANIES.

Rate of interest upon claims of creditors of insolvent trust company.

See CORPORATIONS, 9.

TRUSTS.

When Testamentary Fund Invested in Securities at a Premium Must Be Kept Intact by Deduction of Interest. Where trust funds are invested by a testamentary trustee in bonds having a term of years to run and purchased at a premium, in the absence of a clear direction in the will to the contrary, such a proportionate deduction should be made from the nominal interest as will, at the maturity of the bonds, make good the premiums paid and thus preserve the principal of the fund intact; a surrogate's decree, therefore, in a proceeding settling the trustee's accounts awarding to a life tenant as income the whole amount of the interest coupons is erroneous. *Matter of Stevens.* 471

See N. Y. Water Co. v. Crow (Mem.), 516.

Assignment of interest in trust estate — when notice sufficient to charge trustee with knowledge.

See ASSIGNMENT.

Attorney's lien for services in procuring payment to beneficiary of income of trust fund.

See ATTORNEY AND CLIENT.

Transfer to residuary estate of amount in excess of that required to produce annuities.

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TRUSTS—Continued.

When directions to testamentary guardians as to custody of funds constitute a valid power in trust.

See WILL, 2.

When absolute gift is cut down to life estate constituting a valid express trust—designation of trustees as executors does not invalidate trust provisions—when direction to invest trust funds implies collection of rents and profits—when trust not void as suspending power of alienation.

See WILL, 3-5.

ULTRA VIRES.

Liability of business corporation for expense of publishing notices of special election of stockholders and calls for proxies.

See CORPORATIONS, 10.

VENDOR AND VENDEE.

Judgment directing foreclosure sale of property the title to which remained in vendor—when vendor cannot insist upon sale of mortgaged property for its sole benefit.

See MORTGAGE, 1, 2.

When vendor of personal property, sold under conditional sale and attached to real estate owned by third party, may recover for the same.

See SALE, 1, 2.

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See *People v. Herman* (Mem.), 555; *People v. De Puy* (Mem.), 556.

VILLAGES.

When village not liable for injury to horse caused by his stepping upon a loose stone in highway.

See NEGLIGENCE, 8.

WARRANT.

Of arrest—validity.

See CONSTITUTIONAL LAW, 3.

Of arrest a nullity in the absence of evidence to sustain it.

See CRIMES, 5.

WASTE.

Sufficiency of complaint in action to restrain waste on lands acquired by Cornell University for a college of forestry.

See STATE, 1-3.

WILL.

1. *Equitable Conversion—Contingent Remainder.* A testator directed his executor to invest \$1,500 in real estate for his niece, to be conveyed to her and held during her natural life, and after her death to the heirs of her body forever; the premises so to be purchased he gave, devised and bequeathed to the said niece during her natural life, and after her death "to the right heirs of her body forever;" the remainder of his estate he devised to his brother and his heirs forever; the testator died in 1885; the brother died intestate in 1892, leaving two sons, his only heirs at law; the niece died intestate in 1902 without issue, leaving a brother and sister her only heirs at law; at the time of her death the \$1,500 had not been invested as directed, but remained in the hands of a trustee appointed to succeed testator's executor. *Held*, that the testator having died before the enactment of the Real Property Law (L. 1896, ch. 547) the will must be interpreted according to the provisions of the Revised Statutes (1 R. S.

WILL—Continued.

722, § 3; 725, § 28; 748, § 2); that the direction to invest operated as an equitable conversion of the fund into real property, and that it should be disposed of as if the investment had in fact been made; that the intent of the testator was to give his niece a life estate only in the real property to be purchased with said fund; that upon her death the title thereto vested in the heirs at law of testator's brothers and not in the heirs at law of testator's niece. *Webb v. Sweet*. 172

2. *When Testamentary Appointment of Guardians Is Void—When Directions to Appointees as to Custody of Funds Constitute a Valid Power in Trust.* While a testamentary appointment of guardians for testator's minor children, to whom he bequeathed his estate, is void under the Domestic Relations Law (L. 1896, ch. 272) because it excluded the mother, who survived him, a direction that "all funds and securities belonging to each of my children shall be received, held and paid out by them jointly as such guardians" is effective. The testator could not say who should have the custody and control of the property of his infant children generally, but he had entire power to say who should have the custody and control during their respective minorities of that part of his property that he chose to give to them. He could leave the title in the minors and create a power in trust for the control and management of the fund, and such direction must be regarded as creating a valid power in trust. *Matter of Kellogg*. 355

3. *When Absolute Gift Is Cut Down to Life Estate with Absolute Remainder to Devisee's Wife and Children.* A testamentary provision dividing an estate equally between testatrix's brother and three others, share and share alike, is modified by an immediately succeeding clause, directing that the share due her brother be invested by her executors "for his benefit during his natural life and for the benefit of his wife and his issue after his death," so that an apparently absolute gift of such share is cut down to a life estate therein; and such clause creates a valid express trust to collect the rents and profits for his benefit during his lifetime with an absolute remainder to his wife and children. *Mee v. Gordon*. 400

4. *Designation of Trustees as "Executors" Does Not Invalidate Trust Provisions—When Direction to Invest Trust "for Benefit" of Cestui Que Trust Implies Collection of Rents and Profits and Payment Thereof to Beneficiary.* The fact that the trust created by such clause is imposed upon persons who are designated as executors rather than as trustees, does not invalidate the trust, since the duties imposed upon a person rather than the name applied to him in a will measure his office and position, and the duties of trustees having been imposed upon such executors, they must be regarded as trustees rather than as executors; nor does the fact that there is no explicit direction that the rents and profits of the brother's share shall be collected and paid over to him as a life tenant prevent the execution of the trust in that way, where it is directed that his share shall be invested for his benefit during his natural life and there is no other possible way in which such direction can be carried out, since such direction necessarily implies that the principal shall be kept intact and no power is given him to dispose of such share by will or otherwise. *Id.*

5. *When Trust Not Void as Suspending Power of Alienation.* The direction that the investment of the trust should be, after the death of her brother, "for the benefit" of his "wife and issue after his death," does not, under the liberal construction of the will required by law, violate the statutes relating to the suspension of the power of alienation, in that it requires the investment to be kept and the trust continued after the death of her brother for the benefit of his wife and children, where there is no provision, either by express terms or necessary implication, that a trust was intended for their benefit rather than a final and absolute distribution of the share. *Id.*

WILL — Continued.

6. *Bequest to Hospital under Erroneous Name—When Beneficiary Sufficiently Designated to Enable It to Take Gift.* Where a testator devised all of his real estate to his executors in trust to sell and dispose of the same and to divide the net proceeds of such sale and give "Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary purgatorial fund of said hospital," such provision is not invalid because there was at that time in the city of New York no hospital of that name, where it appears that there was a hospital building and grounds known to the public as St. Francis Hospital which was owned and conducted by a society incorporated under the name of "The Sisters of the Poor of St. Francis" for "the gratuitous care of the sick, aged, infirm and poor" under a statute (L. 1866, ch. 201) which further provided that "no misnomer of said corporation shall defeat any gift, grant or devise provided the intent shall sufficiently appear that any estate or interest was made to be vested in said corporation," and it is found as a fact by the trial court and conceded upon the argument of this appeal that the testator intended that his devise should be paid over to the trustees of that corporation. *Johnston v. Hughes.* 446

7. *Same—When Gift to Charitable Association to Be Added to Fund for Certain Purposes, Not Maintained by Association, Is Valid and May Be Administered by Association.* A contention that the gift was void for the reason that the sisters had never maintained in the hospital a "Blessed Virgin Mary purgatorial fund;" that the only possible object of such a fund was the saying of masses for the spiritual welfare of the souls of the dead in purgatory, and that the sisters, as such corporation, had no power to act as trustees for such a fund or purpose, and that it was not for a corporate purpose, is untenable. No trust is created by the will so far as the bequest to the sisters is concerned; there is a devise of real estate to the executors, in trust, coupled with an imperative power of sale, for the purpose of converting the realty into personalty, three-fourths of which is to be given by the executors to the sisters corporation; there is no gift to that corporation in trust for any purpose or for the benefit of any person in being; in terms, it is an absolute gift, and testator's statement, that it is "for the benefit and use of the * * * purgatorial fund of said hospital," does not indicate an intention, on his part, to cut down the gift or deprive the sisters of the control thereof; it merely indicates a purpose, thus making the gift his primary object and the use to be made of it his secondary purpose; and while there is no fund for the purpose indicated by testator, as he believed, the sisters corporation is a charitable organization, for "the gratuitous care of the sick, aged, infirm and poor," composed of, and conducted by, sisters of a religious society, so that the use to which testator desired the gift to be devoted is consistent with the object and purpose of the corporation, is included in the powers given to it, and is, therefore, valid. *Id.*

See Frick v. Schenck (Mem.), 523; *Fralick v. Lyford* (Mem.), 524; *Matter of Cooney* (Mem.), 546; *Holland v. Holland* (Mem.), 562; *Matter of Moore* (Mem.), 573.

Transfer to residuary estate of amount in excess of that required to produce annuities.

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When wife's interest in policy of life insurance issued for her benefit is contingent and does not pass by her will.

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When testamentary appointment of guardians is void; When directions to appointees as to custody of funds constitute a valid power in trust.

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CRIMES.

One arrested on a criminal charge, by information, is not entitled to writ of habeas corpus before examination; Evidence; When defendant's declaration as to intent with which an alleged criminal act was committed is not conclusive; Grand larceny; Appropriation by director of corporate funds for political purposes; When magistrate has jurisdiction to issue warrant of arrest. (Dis. op.)

People ex rel. Perkins v. Moss, 410, 431.

TRUSTS.

When testamentary fund invested in securities at a premium must be kept intact by deduction of interest.

Matter of Stevens, 471, 473.

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MUNICIPAL CORPORATIONS.

Right of action against city for negligence in care of streets purely statutory and subject to restriction at the pleasure of the legislature; Constitutional law; Requirement in charter as to written notice of existence of snow or ice on sidewalks constitutional.

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Ineffective consent to construction of road; Evidence of company's failure to act upon alleged consent; Consent no bar to action for damages by subsequent grantee without notice; Erroneous admission of evidence of general appreciation of values in other localities. (Dis. op.)

Shaw v. New York El. R. R. Co., 186, 198.

NEGLIGENCE.

Highways; When village not liable for injury to a horse caused by his stepping upon a loose stone in a highway.

McKone v. Village of Warsaw, 836, 837.

CRIMES.

One arrested on a criminal charge by information entitled to writ of habeas corpus before examination; Warrant is a nullity in absence of any evidence to sustain it; Evidence; When defendant's declaration as to intent with which an alleged criminal act was committed is conclusive; Grand larceny; Appropriation by director of corporate funds for political purposes; In absence of evidence establishing felonious intent, magistrate has no jurisdiction to issue warrant of arrest.

People ex rel. Perkins v. Moss, 410, 418.

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Res adjudicata; Transfer to residuary estate of amount in excess of that required to produce annuities. (Dis. op.)

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Erie Co. Savings Bank v. Schuster, 111, 118.

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Sufficiency of complaint in action to restrain waste on lands acquired by Cornell University for a college of forestry, under chapter 122, Laws of 1898; Constitutional Law; Act not violative of Forest Preserve Section of the Constitution; Act not violative of Constitutional prohibition against giving or loaning money or credit of the State.
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When testamentary appointment of guardians is void ; When directions to appointees as to custody of funds do not constitute a valid power in trust. (Dis. op.)

Matter of Kellogg, 355, 361.

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When testamentary fund invested in securities at a premium need not be kept intact by deduction of interest. (Dis. op.)

Matter of Stevens, 471, 477.

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Proceeding against an officer of a municipality for enforcement of a right, not abated by resignation or removal of officer.

People ex rel. La Chicotte v. Best, 1, 3.

RAILROADS.

Provisions of Railroad Law (Art. 4, § 101) with respect to five-cent fare on street surface railroads, not applicable where lines leased are steam surface or elevated roads ; Change of motive power on leased lines does not affect rate of fare ; Rate of fare a question for legislative determination.

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When title by adverse possession, although established by parol testimony, is marketable.

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When railroad company sued for conversion of goods delivered to it for transportation may set up its ownership of the goods as a defense.

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ATTORNEY AND CLIENT.

Lien for services in procuring payment to beneficiary of income of trust fund established for his support and education; Code Civ. Pro. § 66.

Matter of Williams, 286, 287.

CORPORATIONS.

Interest upon claims of creditors of insolvent trust company; Contract rate before, legal rate after the appointment of receiver.

People v. Merchants' Trust Co., 293, 295.

TRUST MORTGAGE.

Judgment directing foreclosure sale of property, the title to which remained in vendor; When vendor cannot insist upon sale of mortgaged property for its sole benefit.

Washington Trust Co. v. Morse I. W. & D. D. Co., 307, 309.

NEGLECTANCE.

New York (City of); Liability of board of education for injuries caused by falling of ceiling in school room.

Wahrman v. Board of Education, 331, 332.

Master and servant; When employee is not a superintendent within meaning of Employers' Liability Act (L. 1902, ch. 600); Master not liable for injuries caused to servant by negligence or error in judgment of co-servant.

McConnell v. Morse I. W. & D. D. Co., 341, 343.

Death caused by falling from elevator; Erroneous nonsuit.

Gray v. Siegel-Cooper Co., 376, 378.

WILL.

Bequest to hospital under erroneous name; When beneficiary sufficiently designated to enable it to take gift; When gift to charitable association to be added to fund for certain purpose, not maintained by association, is valid and may be administered by association.

Johnston v. Hughes, 446, 448.

VANN, J.

CONSTITUTIONAL LAW.

Stock Transfer Tax Act (L. 1906, ch. 414, § 1) invalid as an arbitrary discrimination in favor of one as against another of the same class; Stock Transfer Tax Act (Tax Law, § 315; amd. by L. 1905, ch. 241) not affected by unconstitutionality of act of 1906; Validity of warrant of arrest charging violation of statute.

People ex rel. Farrington v. Mensching, 8, 15.

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Questions of law in criminal cases raised only by exceptions.

People v. Huson, 67, 98.

TRANSFER TAX.

Rate not affected by assignment of legacy; Legacy to child of adopted daughter; Construction of phrase "lineal descendant;" Tax Law (L. 1896, ch. 908), § 221.

Matter of Cook, 253, 256.

APPEAL.

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People v. Johnston, 319, 320.

FOREST, FISH AND GAME LAW.

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People v. Worden, 322, 323.

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Cole v. Sweet, 488, 490.

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LANDLORD AND TENANT.

Lease of land for term of years and renewals thereof; Ownership of buildings on land at expiration of last term; When lessor not estopped from asserting title to buildings on leased land by extension of option to renew lease.

Precht v. Howard, 136, 138.

ASSIGNMENT OF INTEREST IN TRUST ESTATE.

When notice thereof is sufficient to charge trustee with knowledge of the facts and render it liable for payment to beneficiary.

Seger v. Farmers' Loan & Trust Co., 314, 316.

NEGLIGENCE.

Liability of master; Insufficient proof of negligence.

Reude v. N. Y. & Texas Steamship Co., 382, 384.

CRIMES.

One arrested on a criminal charge by information is not entitled to writ of habeas corpus before examination. Evidence; When defendant's declaration as to intent with which an alleged criminal act was committed is not conclusive; Grand larceny; Appropriation by director of corporate funds for political purposes; When magistrate has jurisdiction to issue warrant of arrest. (Dis. op.)

People ex rel. Perkins v. Moss, 410, 445.

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Res adjudicata; Will; Transfer to residuary estate of amount in excess of that required to produce annuities.

Griffen v. Keese, 454, 458.

MURDER.

Circumstantial evidence; Trial; Cross-examination by prosecution of its own witnesses; Indictment, when denial of motion to dismiss not erroneous; Legality and sufficiency of evidence upon which indictment is found; Code Crim. Pro. § 313; Reception by grand jury of the unsworn testimony of infants under twelve years of age; When examination as to intelligence of such witnesses by grand jury is sufficient compliance with law; Code Crim. Pro. § 392.

People v. Sexton, 495, 497.

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NEW YORK CITY.

Power to grant franchise for electric lighting vested in the board of aldermen, not board of electrical control, on October 30, 1896; Statutes; Practical construction.

People ex rel. W. S. El. Co. v. C. T. & E. S. Co., 58, 61.

INSANE.

Appointment of committee for insane life convict; Appointment of committee cannot be attacked collaterally in action to recover convict's estate.

Trust Co. of America v. State Safe Deposit Co., 178, 180.

AMENDMENT.

Changing designation of defendant from representative to individual capacity does not effect a change of parties; Statute of Limitations; Negligence; Injuries received by plaintiff while examining unfinished building at invitation of defendants.

Boyd v. U. S. Mortgage & Trust Co., 262, 264.

CONDEMNATION PROCEEDINGS.

Objection by property owner; Property or interest to be condemned must be accurately described in petition; Telephone line; Proceeding to acquire right to trim trees in order to protect line from interference; When petition insufficient.

Bell Telephone Co. v. Parker, 299, 302.

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PERSONAL PROPERTY.

Conditional sale; When vendors of personal property, sold under conditional sale and attached to real estate owned by third party, may recover for the same; Damages; Effect of section 116 of the Lien Law (L. 1897, ch. 418) upon the contract of conditional sale in question.

Davis v. Bliss, 77, 80.

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Liability of master for defective machine; Evidence; Impeachment of witness; Evidence of repairs to machine after accident incompetent; Evidence that witness was nearly injured by the machine which injured plaintiff incompetent; Impropriety of remarks of counsel as to defendant's insurance against liability.

Laughlin v. Brassil, 128, 130.

ELEVATED RAILROAD.

Ineffective consent to construction of road; Evidence of company's failure to act upon alleged consent; Consent no bar to action for damages by subsequent grantee without notice; Testimony of deceased witness read on new trial; When error in admission of evidence as to value is cured; Evidence of general appreciation of values in other localities.

Shaw v. New York El. R. R. Co., 186, 189.

COMMON CARRIERS.

Action for assault upon passenger by employees of street railway company; When allegations of complaint therein constitute cause of action for breach of defendant's contract to carry passengers safely.

Busch v. Interborough R. T. Co., 388, 389.

CORPORATIONS.

Liability of business corporation for expense of publishing notices of special election of stockholders and calls for proxies to be voted thereat under attempted authorization of majority of directors.

Lawyers' Ad. Co. v. C. R. L. & R. Co., 395, 396.

WILL.

When absolute gift is cut down to life estate, with absolute remainder to devisee's wife and children; Designation of trustees as "executors" does not invalidate trust provisions; When direction to invest trust "for benefit" of cestui que trust implies collection of rents and profits and payment thereof to beneficiary; When trust not void as suspending power of alienation.

Mee v. Gordon, 400, 403.

CRIMES.

One arrested on a criminal charge by information entitled to writ of habeas corpus before examination; Warrant is a nullity in absence of any evidence to sustain it; Evidence; When defendant's declaration as to intent with which an alleged criminal act was committed is conclusive; Grand larceny; Appropriation by director of corporate funds for political purposes; In absence of evidence establishing felonious intent, magistrate has no jurisdiction to issue warrant of arrest. (Con. op.)

People ex rel. Perkins v. Moss, 410, 424.

COURT OF CLAIMS.

Practice; Negligence; Failure to move for nonsuit at close of evidence precludes review of questions of law.

Spencer v. State of New York, 434, 435.

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Erroneous dismissal of complaint in action to recover for death of plaintiff's intestate struck and killed by trolley car while crossing tracks of street surface railroad; Contributory negligence, when question of fact. (Dis. op.)

Darienza v. New York City Ry. Co., 567.

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DOMESTIC ANIMALS.

Common-law rule of liability of owner of animals for trespasses thereof; Exceptions to rule; When owner liable for trespasses of animals lawfully driven along public highway.

Wood v. Snider, 28, 30.

SPECIAL AGENTS OF STATE EXCISE COMMISSIONER.

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How their testimony as witnesses for the state should
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charge as to duties of special agents based upon facts
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Cullinan v. Furthman, 160, 162.

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Webb v. Sweet, 172, 174.

MURDER.

Insanity; Sufficiency of evidence; Admissibility of statements
made by defendant to medical expert who examined him
during the trial and subsequently related them to jury;
Use of minutes of stenographer who attended examina-
tion in interrogating expert; Reason for exclusion of
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People v. Furlong, 198, 200.

TAX.

Rochester (city of); When city in action to foreclose tax lien
for certain tax may recover deficiency judgment for
other unpaid taxes on same property; Effect of curative
statute (L. 1903, ch. 522). (Dis. op.)

City of Rochester v. Rochester Ry. Co., 216, 224.

INSURANCE.

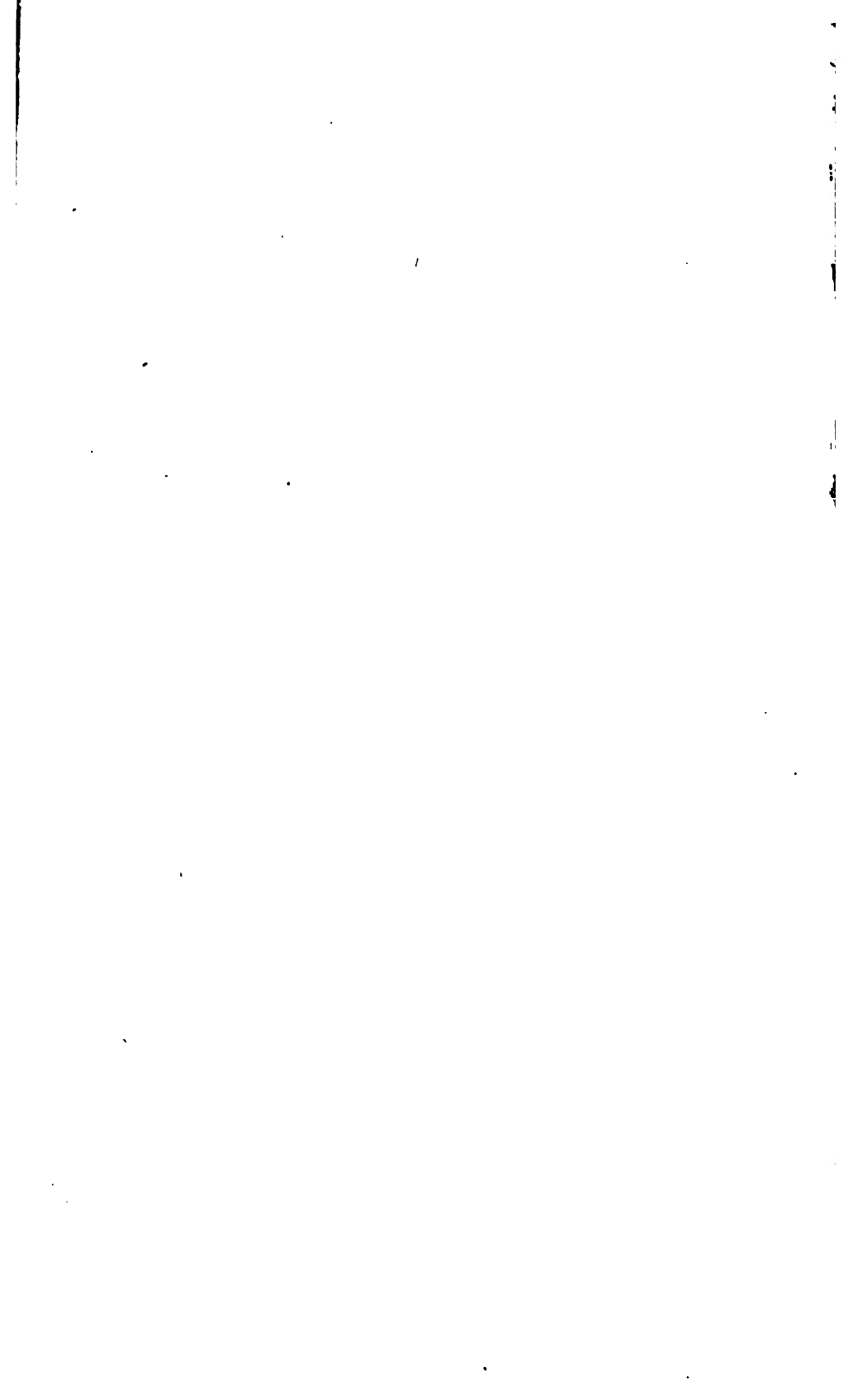
Testamentary disposition by wife of policy of life insurance
issued for her benefit; When wife's interest in policy is
contingent and does not pass by her will.

Bradshaw v. Mutual Life Ins. Co., 347, 350.

PER CURIAM.**ELECTION LAW.**

Borough of Manhattan; Publication of list of registration
and polling places in party newspapers; Test prescribed
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newspapers.

People ex rel. Quinn v. Voorhis, 327, 329.







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